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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1554

JAMES O. MING,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE
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ENTRY OF APPEARANCE

William J. Beiswanger, Esquire, hereby enters his appearance before the United States Supreme Court on behalf of James O. Ming, Petitioner.

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INDEX

Page

TABLE OF AUTHORITIES iv

ORDER BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED FOR REVIEW 3

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 8

POINTS RELIED ON FOR PETITION OF THE WRIT:

POINT I — The Order Of The Court Of Claims Is In Conflict With Federal Statutes, Executive Rulings And Civil Service Regulations 30

POINT II — The Question Involved Is An Important Issue Of Federal Law Which Has Not Been, But Should Be, Settled By This Court 36

CONCLUSION 40

APPENDIX

Order ..... A-1 - A-2

Decision-Civil Service Commission, Board of Appeals and Review ..... A-2 - A-8

Finding — Civil Service Commission, Boston Region ..... A-9 - A-15

RIF Notice A-16

Agency Reply ..... A-17 - A-26

AUTEC — Background Statement ..... A-26 - A-32

Executive Order ..... A-32 - A-35

INDEX (Continued)

Page

5 USC 1302 ..... A-36

5 USC 7512 ..... A-37

Petitioner's Monitoring Functions ..... A-38 - A-45

Petitioner's Technical Duties — Electronics Engineer, Physicist ..... A-45 - A-56

Summary — Advertised Agency Job Vacancies. A-57

Excerpt — Advertised Agency Job Vacancies .. A-58

Petitioner's Affidavit to Court of Claims A-59 - A-71

Excerpt — GSA contract requirement ... A-71 - A-72

Petitioner's request for Reemployment Consideration A-73

Letter from Commission — Petitioner Placed on Two Registers — Huntsville and Mobile ..... A-74 - A-75

Letter from Agency Confirming Vacancies at Cape Kennedy and Mr. Brackett's appointment A-76

TABLE OF AUTHORITIES

CASES

Baxter v. United States, 136 F. Supp. 748 (Ct. Cl., 1954) 35

Gordon v. Bright, 306 F. Supp. 252 (D.C. Okla. 1968) 34

Saggau v. Young, 138 F. Supp. 140 (D.C. D.C., 1956) 34,35

Sampson v. Murray, 94 S. Ct. 937 (1974) 35,37,38

TABLE OF AUTHORITIES (Continued)

Page

Urbina v. United States, 180 Ct. Cl. 194 (1967) 34

Williams v. Brown, 384 F. 2d 981 (C.A. D.C., 1967) 34,35

United States v. Diebold, Inc., 82 S. Ct. 993 (1962) 36

STATUTES

5 USC 1301 31

5 USC 1302 15,25,31

5 USC 7512 40

REGULATIONS

5 CFR 330 Subpart B 26

5 CFR 330 Subpart C 26

5 CFR 330.101 26

5 CFR 330.301 26

5 CFR 330.302-.304 28

5 CFR 330.303-.306 29

5 CFR 351. Subparts E and F 19

5 CFR 351.201 25,26

5 CFR 351.203 23

5 CFR 351.301 15

5 CFR 351.402 23

5 CFR 351.1001 27

TABLE OF AUTHORITIES (Continued)

Page

EXECUTIVE RULINGS

Executive Order 10577 26

Executive Order 10987 31,37

COURT RULES

Federal Rules of Civil Procedure 56 36

MISCELLANEOUS

The Federal Times 39,40

Memorandum. President of the United States. Gerald R. Ford 39,40

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, James O. Ming, hereby petitions for a Writ of Certiorari to review the Order of the Court of Claims affirming the decision of the United States Civil Service Commission, Board of Appeals and Review (hereinafter referred to as "Commission").

On June 16, 1972 Petitioner's services as an employee of the Atlantic Undersea Test and Evaluation Center (AUTEC), branch of the Naval Underwater Systems Center (NUSC), were terminated after 29 years of satisfactory Government service of which the last 5 years were with the Agency. Grounds given

by the Agency for the severance was Reduction-in-Force (hereinafter referred to as "RIF").

At severance Petitioner's job title was "Physicist (General), GS-1310-13" and his job position with the Agency was "Electronics Engineer/Physicist". In addition, for purposes of retention and reemployment, Petitioner was a preferential employee holding the highest preference rank, viz., IA.

The Agency alleged that Petitioner's job was abolished as his functions were transferred to RCA, an outside contractor. As part of the RIF, the Agency established for Petitioner, for purposes of retention and reemployment priority, the competitive level of "Physicist" in the competitive area of "West Palm Beach, Florida." Therefore, the Commission held that Petitioner was unable to displace lower ranking employees since he was the only physicist in West Palm Beach. In addition, the Commission held Petitioner had no right to the vacant jobs then being advertised by the Agency in other areas.

Petitioner's appeal to the Commission was based on the assertion that the Agency's action was contrary to the law and regulations, and was so arbitrary and capricious as to constitute bad faith. The Court of Claims upheld the decision of the Commission affirming the Agency's actions.

ORDER BELOW

The Order of the United States Court of Claims dated March 14, 1975 appears in the appendix, Page A-1 - A-2.

JURISDICTION

The Order sought to be reviewed in this case was entered by the United States Court of Claims on March 14, 1975. No petition for rehearing was filed. The statutory provision believed to confer jurisdiction on this Court to review the order in question is 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Claims err in upholding the severance action by the Agency confirmed by the Commission in that Petitioner's termination was so arbitrary, capricious and erroneous as to imply bad faith in that:

a) The Agency did deliberately deceive Petitioner by stating to him that if he returned to West Palm Beach his job would be secure at a time when they knew it was slated for liquidation?

b) The Agency's allegation that job functions were transferred to RCA was totally devoid of any evidentiary support which was readily available and contrary to the substantial, credible evidence presented by Petitioner that his functions were not and could not have been transferred?

c) The Agency did deliberately establish a competitive level and competitive area so narrow and contrary to the regulations as to preclude Petitioner from exercising his

retention and reemployment rights under the law?

d) The Agency failed to furnish Petitioner with a copy of its reply to his appeal to the Commission and, therefore, he was not put on notice as to the grounds for his severance nor the reasons for denial of his retention and reemployment rights?

e) Both the Agency and the Commission failed to grant Petitioner a hearing contrary to the law and Executive Order?

2. Did the United States Court of Claims err in upholding the decision of the Commission whose function it is to prescribe and enforce regulations for the administration of laws and Executive Orders that implement Congressional policy which is that preference in appointment, reinstatement, reemployment and retention shall be given to preferential employees? Petitioner alleges that as the highest ranking preferential employee his lawful rights to retention, reinstatement and reemployment were violated when he was informed that he was unable to displace any employee and to date, or nearly three years after severance, has received no offer for reinstatement or reemployment notwithstanding the Agency was advertising vacancies in those areas of expertise it qualified him for reemployment. Furthermore, in lieu of Petitioner, the Agency reemployed an employee with a lower preferential rank, contrary to the law and regulations that require reemployment be made in preferential order.

3. Did the Court of Claims err in granting Respondent's motion for summary judgment in that Petitioner presented triable issues of fact?

STATEMENT OF THE CASE

1. On April 11, 1972, just 3½ months after transferring from Andros Island, Bahamas to West Palm Beach, Florida, Petitioner was notified that his services with the Agency were being terminated as of June 16, 1972. Appendix Page A-16.

2. On June 7th, 1972, Petitioner filed an appeal to the Director, Boston Region, United States Civil Service Commission upon the grounds set forth in the issues above. Supp. Record 72-2123.

3. On July 28, 1972, the Agency replied by letter to the Commission that there were no similar positions in the competitive area occupied by lower retention status employees and, therefore, Petitioner was unable to exercise any retention rights. Appendix Page A-21. It designated Petitioner's competitive area as West Palm Beach, Florida. Appendix Page A-22. It stated that Petitioner's technical duties and responsibilities were transferred to RCA. (Appendix Page A-24); that the RIF action was the result of a six month long study (Appendix Page A-26); and that vigorous effort would be made to place terminated employees within the Agency, in other Naval and Federal activities inside and outside the commuting area, and if necessary in private industry. Appendix Page A-25 - A-26. No evidence, other than this letter, was submitted by the Agency. Petitioner was not furnished with a copy. Appendix Page A-70.

4. On August 15, 1972, the Boston Region of the Commission upheld the Agency action stating that the competitive level and area complied with the regulations and since Petitioner was the only physicist, Petitioner was not improperly reached for termination. It found that there was a reorganization in that certain functions were transferred to an outside contractor and, thus, Petitioner's severance was not unlawful. Appendix Pages A-9 - A-15.

5. On August 28, 1972, Petitioner appealed this decision to the Board of Appeals and Review. In addition to raising the issues formerly presented, Petitioner objected to the basis of his first appeal to the Regional office stating that he was told by the Agency that his position was to be abolished. Since he was not furnished with a copy of the Agency reply, the first knowledge he had that his functions were transferred to an outside contractor appeared in the decision of the Regional Office. Record 13-31. Appendix Page A-70.

6. On January 19, 1973, the Board of Appeals and Review upheld the decision of the Regional Office. Again it held that the competitive level and area established by the Agency conformed to the regulations and, therefore, Petitioner was not improperly reached for separation. Also, transfer of functions to an outside contractor are matters within the prerogative of the Agency and not subject to review. The Commission elaborated on the point that Petitioner was not offered a position despite the fact that the Agency was advertising vacancies in those areas of expertise which the Agency qualified him for reemployment. It stated that Petitioner had no right to any assignment at Cape Kennedy nor to any other vacancy for an

Agency is not required to fill a vacancy in a reduction in force. Appendix Pages A-2 - A-8.

7. On April 29, 1974, Petitioner filed his petition to the United States Court of Claims, stating that the Agency's actions were unlawful, arbitrary, capricious evidencing bad faith; demanding that Petitioner be reinstated to the same rank and pay level as he would have held had he not been unlawfully discharged and that he be awarded back pay. In addition, he asked the Court to award him punitive damages in the amount of $100,000. In the alternative, Petitioner demanded a trial de novo.

8. On August 19, 1974, Respondent filed motions to dismiss and for summary judgment.

9. Petitioner then filed a response to Respondent's motions and a cross-motion for summary judgment to which Respondent responded on December 3, 1974.

10. Oral argument on the motions was held on March 6, 1975.

11. On March 14, 1975, the Court of Claims issued its Order granting Respondent's motions to dismiss and for summary judgment, dismissing Petitioner's cross-motion for summary judgment. In its Order the Court of Claims held that Petitioner failed to state a claim upon which relief could be granted, and that the administrative action is supported by substantial evidence and is not arbitrary, capricious or so grossly erroneous as to imply bad faith. Appendix Page A-1. It is from this Order that Petitioner files this petition for Writ of Certiorari.

STATEMENT OF FACTS

The facts pertaining to this case show that the Agency's action, as upheld by the Commission was not supported by any evidence and that Petitioner's termination was so arbitrary, capricious and erroneous as to constitute bad faith. The facts as supported by the evidence are voluminous, therefore, they are presented in chronological order corresponding to the periods in which the alleged violations occurred as follows:

A. *Events Leading Up To Notice of Termination*
B. *Events From Notice of Termination to Severance*
C. *Events Subsequent to Termination*

In Summary, Petitioner alleges that he was:

(1) unlawfully separated from service.
(2) unlawfully denied retention rights.
(3) unlawfully denied reemployment rights.

A. *EVENTS LEADING UP TO NOTICE OF TERMINATION*

In summary, Petitioner alleges that the Agency's action during the six months period preceding his transfer back to the United States from Andros Island, Bahamas, was so deceitful as to constitute bad faith. The deceptive acts consist of repeated assurances by the Agency that if Petitioner returned to his old job in West Palm Beach, Florida his position would be secure. The evidence overwhelmingly reveals that the statements were part of a deliberate scheme to

separate Petitioner contrary to the law and regulations.

The entire evidence in support of the Agency's unlawful action consists of its reply submitted the Commission. Appendix Pages A-17 - A-26. The reply makes the following statement: "These RIF actions were based on a six month study of AUTEC, its mission, its requirements, and its personnel. . .". Appendix Page A-26. Using as a point of reference April 7, 1972, the date of the RIF notice (Appendix Page A-16), the "six month study period" could have commenced no later than October 7, 1971. With the exception of the first item listed below, all the enumerated deceptive acts occurred within this period, and it may reasonably be concluded, predicated upon other evidence of deceit, that likewise the August, 1971 act was part of the deceitful scheme to unlawfully terminate Petitioner.

Acts of Deception

1. *August, 1971.* On or about July, 1971 AUTEC ceased to be an independent agency as responsibility for management was transferred to the Naval Underwater Systems Center (hereinafter referred to as NUSC), headquartered in Newport, Rhode Island. Appendix Page A-24. On or about August, 1971, Petitioner was requested to return to West Palm Beach for a conference with two representatives from the Agency who informed him of the transfer of command. Petitioner reviewed his responsibilities with the new Agency personnel and made the point that although he was not directly connected with the data processing group in

West Palm Beach he did work closely with it. The Agency representatives informed him that he was doing a good job and encouraged him to keep it up. Petitioner was relieved of the concern that the change in command may result in certain personnel revisions and eliminations and in particular his job. Appendix Page A-59.

2. *October, 1971.* A manager of the data processing group in West Palm Beach visited Petitioner on Andros Island in October, 1971, again with the purpose of reviewing Petitioner's functions. It appeared to Petitioner that this Agency manager was asking Petitioner if he would consider joining his group, and since Petitioner was preparing for his return to the United States he gave it favorable consideration. Appendix Page A-60.

3. *November, 1971.* While in West Palm Beach on Agency business on or about November, 1971, Petitioner deliberately sought out a personnel administrator regarding his reassignment to West Palm Beach since his two year tour of duty was coming to a conclusion. Although Petitioner was anxious to return to West Palm Beach he had the option of remaining on Andros for another five or six years and preferred this option over separation. One of the primary purposes of this visit pertained to his job security. A personnel administrator put him in telephone contact with a personnel specialist at Agency headquarters in Newport, Rhode Island. Due to numerous rumors that the data process group in West Palm Beach as well as the entire operation may be closed or transferred, Petitioner point blank made inquiry

concerning the future of the West Palm Beach operation and in particular data processing. This specialist informed Petitioner that the data processing group and the entire West Palm Beach function would continue as in the past. Upon these assurances Petitioner requested a transfer back to West Palm Beach which was granted. Appendix Page A-61. This deliberate act of deception occurred approximately four months before the RIF notice or well within the "six month study period" of Agency personnel requirements.

4. *December, 1971.* On or about December 22, 1971 Petitioner was assigned to the data processing group, West Palm Beach. Rumors regarding transfer and liquidation of jobs had not subsided and again Petitioner made direct inquiry concerning his future. The manager of the data processing group informed Petitioner that the Agency told him that it had no intention of terminating any personnel. On these assurances Petitioner purchased a home. Appendix Page A-62.

5. *April 11, 1972.* Petitioner was notified that as of June 16, 1972 his job was terminated for the reason that his position and functions were to be abolished. Appendix Page A-65.

Summary

From August to December, 1971 on several occasions the Agency informed Petitioner that his job in West Palm Beach was secure. Upon these assurances Petitioner transferred from Andros Island to West Palm Beach. By its own admission, the Agency knew that his job was slated for termination yet deliberately

informed Petitioner to the contrary. Petitioner suffered irreparable harm as the result of these deceptive acts as he forfeited his right to remain on Andros Island and the right to reemployment opportunities under the Overseas Placement Assistance Program. The Agency's acts of deception are so arbitrary and capricious as to constitute bad faith. Petitioner's termination is contrary to law.

B. *EVENTS FROM NOTICE OF TERMINATION TO SEVERANCE*

The Agency on or about the time it issued the RIF notice to Petitioner, told Petitioner that they were abolishing his functions and, therefore, were abolishing his position. Appendix Page A-70. In its reply to the Commission, the Agency stated that it had transferred the technical duties and responsibilities to RCA. (Appendix Page A-24. The Agency in the RIF notice (Appendix Page A-16) set Petitioner's competitive level as physicist (General) GS-1310-13, and the competitive area was established in its reply as AUTEC, West Palm Beach, Florida. Appendix Page A-22. Since Petitioner was the only physicist in West Palm Beach, the competitive level and area were so narrowly construed as to effectively preclude him from the right to displace others. In summary, as to this second period, Petitioner alleges that the Agency's actions were so arbitrary and capricious as to constitute bad faith in that:

(i) It presented no evidence that Petitioner's functions were abolished nor were they transferred to RCA. To the contrary, Petitioner presented overwhelming

evidence that his functions were not transferred nor was it within the Agency's power to transfer them to RCA.

(ii) It deliberately set a competitive level so narrow that in conjunction with misrepresenting his qualifications and setting new and higher job standards. Petitioner was denied his retention rights.

(iii) It deliberately set a competitive area (West Palm Beach) so narrow that it is in violation of the regulations pertaining to the establishment and definition of such areas.

(1) *Evidence By Agency That Functions Transferred Totally Lacking*

A. *Agency's Evidence*

The entire record of the Commission proceeding, except for the Agency's reply, was presented by Petitioner on his own behalf. The United States Court of Claims in its Order (Appendix Page A-1) concluded that the administrative action was "supported by substantial evidence". The only evidence on behalf of the Agency is its own reply. Appendix Pages A-17 - A-26. This evidence was not sworn to. Also since Petitioner was not granted a hearing either by the Agency or Commission, nor were the contents subject to examination or cross-examination under oath, thus, the Agency presented no acceptable nor credible evidence on its behalf, yet the Commission ruled on behalf of the Agency solely on the basis of this letter as evidenced

by the fact that the decisions of the Commission contained quotes from it.

The Agency stated that "technical duties and responsibilities are now performed by RCA contractor employees, while some minor administrative functions such as signing of reports, approval of contractor documentation and the like are now performed by other AUTEC employees as required". Appendix Page A-24. This self-serving statement is the sole evidence in support of the Agency's allegation that Petitioner's functions were transferred to RCA. Yet the Commission's decisions, both that of the Board of Appeals and Review and the Boston Region, found that the "record" showed that Petitioner's position was abolished. Petitioner states that this constitutes no evidence on behalf of the Agency, that the Commission was in dereliction of its duties and responsibilities when it accepted only the Agency's statement as to this ultimate fact when minimal effort through interrogatories could have readily supported the Agency's contention. For example:

(i) Why did not the Commission ask the Agency when the functions were transferred? Petitioner was performing all his functions as of June 16, 1972, his separation date (Appendix Page A-64) and, therefore, to date of separation no functions had been transferred. If the Agency had been planning for six months for this RIF does it not seem logical that Petitioner would have been contacted to assist in the change over?

(ii) Why did not the Commission ask the Agency for a copy of the renegotiated contract with RCA? RCA was not going to assume these additional duties without compensation.

(iii) Why did not the Commission ask the Agency for a complete list of functions transferred and those retained? The Agency stated that some of the functions were retained, and under the regulations Petitioner has the right to transfer with his functions. 5 C.F.R. 351.301.

The "record" does not reveal any answers to these questions. In fact, it was the duty of the Commission to ascertain the functions transferred it being the Governmental body responsible for protecting government employees from arbitrary and capricious action by an agency. The Commission violated the law in this regard. 5 USC 1302(b). Petitioner alleges that to make inquiry as suggested asks no more than would be required of any ordinary, prudent trier of fact.

B. *Petitioner's Evidence*

It has been pointed out that the Agency submitted no evidence in support of its position. Petitioner, on the other hand, submitted substantial evidence to show that the Agency's action was arbitrary and capricious. Petitioner's evidence consisted of the following:

(1) Affidavit of deceit perpetrated by Agency. Appendix Pages A-59 - A-62.

(2) Affidavit that his job functions were being performed by him and had not been transferred to RCA as the Commission alleged at date of severance. Appendix Page A-64.

(3) Affidavit, job description documentation and an excerpt from the GSA contract creating the presumption that for the most part Petitioner's job functions were not transferable to an outside contractor. Appendix Pages A-38 - A-56, A-62 - A-64, A-71 - A-72.

(4) Copies of budget forecast showing no schedule reduction in the AUTEC management group. Record 248, 254.

Job description analysis submitted by Petitioner indicates that one of his primary responsibilities consisted of monitoring performance of the outside contractors (RCA, IBM, Control Data Corporation). Appendix Pages A-38 - A-45. The function of monitoring cannot be transferred to the one monitored! Furthermore, certain of Petitioner's functions must be performed by the Government under the GSA Contract and cannot be transferred to RCA. Appendix Pages A-62 - A-64, A-71.

RCA operated the equipment supplied by Control Data and IBM. Since RCA also is an equipment vendor as well as operator, there is a conflict of interest between RCA and IBM and Control Data. Is it likely that monitoring functions would be transferred to a competitor?

Petitioner's monitoring functions are set forth in detail in the Appendix, Pages A-38 - A-45. They are also summarized in the Appendix, Pages A-62 - A-64. In essence, Petitioner's monitoring responsibilities included:

(1) Reviewing data for accuracy and follow-up on corrections of errors made by RCA.

(2) Comparing invoices received from IBM and Control Data with the GSA contract and certifying complainace thereto. This function is required of a Government employee under the GSA contract and cannot be transferred.

(3) Examining equipment failure reports to determine if the Government was entitled to a refund or credit. Again this function cannot be transferred to an outside contractor.

(4) Monitoring installation of new equipment purchased from an outside contractor to determine if operational and in conformance with the GSA contract. This function under the GSA Contract is required to be performed by the Government.

(5) Monitoring performance of RCA, Control Data and IBM and recommending monetary awards for outstanding work.

(6) Establishing equipment maintenance schedules under the GSA contract, also required of the Government under the GSA Contract.

As previously pointed out Petitioner was performing all his duties to date of separation on June 16, 1972. Appendix Page A-64. The Agency's reply is dated July 28, 1972 and this reply stated that Petitioner's functions were transferred to RCA. Appendix Page A-17, A-24. Therefore, the Agency asks us to believe that Petitioner's functions were transferred to RCA in a little over one month when from date of the RIF notice (April 7, 1972; Appendix Page A-16) to date of separation or approximately two months no functions were transferred nor was Petitioner asked to nor did he assist in any transfer. The allegation by the Agency that Petitioner's functions were transferred to RCA before July 28, 1972 is not credible.

Petitioner further presented evidence to the Commission as to Agency personnel forecasts. Since there were 66 employees when Petitioner was separated and the forecast budgeted 76, they did not indicate any transfer of functions. Record 249, 254.

In summary, the Agency presented no evidence that Petitioner's functions were transferred to RCA as justification for the RIF. To the contrary, Petitioner presented substantial, credible evidence that his functions could not be transferred for certain functions were required to be performed by the Government under the GSA contract and all functions associated with monitoring and approving incentive awards could not be transferred to the one monitored or to a possible recipient of an award.

(2) *Unduly Narrow Competitive Level*

Approximately one week after receiving his RIF notice Petitioner was informed by the Agency that he could not exercise any retention rights, that is, he was not eligible to "bump" any lower preferential ranking employee being retained. Appendix Page A-66. The regulations establish a priority system whereby a preferential employee may displace other employees with a lower ranking. 5 CFR Part 351, Subpart E and F. Pertaining to Petitioner's retention rights, his competitive level was established as "Physicist (General), GS-1310-13" (Appendix Page A-16); and his competitive area was limited to "West Palm Beach" (Appendix Page A-22). However, Petitioner held the highest retention standing classification, IA, within his competitive level and area. Appendix Page A-16.

Relative to Petitioner, the Agency presented a list of job positions with the Agency at West Palm Beach then held by lower retention standing employees, and concluded that there was no position that was similar to the one held by Petitioner. Appendix Pages A-19, A-21. Although no position of physicist appears on this list, Petitioner alleges that he also competes with: (1) electronics engineers, (2) operations research analysts, (3) electrical engineers, and (4) general engineers. With regard to the Operations Research Analysts position the Agency contended that although Petitioner met the minimum requirements for the position of operations research analysts it would require two years additional training to qualify Petitioner for the particular position held by a lower retention standing employee in West Palm Beach. Appendix Page A-20.

The Commission found that Petitioner was unable to displace electrical or electronics engineers on the list as the functions of a physicist are not mutually interchangeable. It further held that the regulations state that he must be able to step into a position without undue interruption and, therefore, Petitioner is not qualified for that particular Operations Research Analyst position then held by a lower retention standing employee. Appendix Pages A-6, A-7 - A-8.

The Regional office of the Commission held that the position of physicist is sufficiently different from any other occupational series then held by a lower retention standing employee and Petitioner could not exercise any retention rights. Appendix Page A-11.

Petitioner presented substantial, credible evidence, uncontradicted by any evidence presented by the Agency that he is qualified as an electronics, electrical, general engineer or as an Operations Research Analyst. A summary of Petitioner's work experience is as follows:

RCA (Record 69-74)

1959 — 1960 Communications Engineer
1960 — 1961 Mathematician
1961 — 1962 Analyst

Civil Service — Air Force (Record 65-68)

1964 — 1966 Mathematician
1966 — 1967 Physicist

Civil Service — U.S. Navy — AUTEC (Appendix Pages A-45 - A-56.

1967 — 1972 Physicist

Petitioner holds a bachelors degree in mathematics and has completed approximately 125 credit hours in excess of the requirements for that degree in physics, higher mathematics and computors of which 52 hours were at the graduate level. Record 263, 264.

Petitioner's job description with the Agency at time of separation was "Electronics Engineer/Physicist (Data Systems)" which includes all systems performed by the Agency in radar, optical, in-water and data transmission. In addition to the monitoring functions his technical functions consisted of serving as an engineering consultant reporting to an electronics engineer which required a background in electronics engineering and data systems. Appendix Pages A-45 - A-56)

The head of the Range Development and Operations Divisions describes Petitioner as a consulting Physicist in the area of Data Systems pertaining to optical and acoustics radiation phenomena. Petitioner was also responsible for consulting in the systematic solution of underwater space and time problems. Appendix Page A-50.

Therefore, in summary, to date of separation Petitioner had approximately twenty years experience in various capacities as an engineer, mathematician and physicist in all data systems.

Furthermore, he had completed over 125 credit hours of college level work beyond the bachelors degree in this area. Petitioner presented substantial, credible evidence that he was qualified for the position of general, electrical and electronics engineer, especially since his job position to date of severance was that of an electronics engineer. He likewise qualified for the operations research analysts job, needing no substantial additional training as he has been associated with those activities for over ten years and developed some of the techniques in force at his separation. Appendix Page A-69. His evidence establishes that such positions are mutually interchangeable, that Petitioner could have been assigned to any one without unduly interrupting the work schedule contrary to the finding of the Commission. The Commission relied solely upon the Agency's reply which again consisted of nothing more than unsubstantiated statements totally contradictory to the evidence.

(3) *Unduly Narrow Competitive Area*

Reiterating the finding above that the Agency and Commission precluded Petitioner from "bumping" other lower retention status employees since he was the only physicist in the West Palm Beach area. Petitioner likewise contends that the restriction of the competitive area to West Palm Beach was likewise unduly narrow. Petitioner alleges that Andros Island and West Palm Beach should have been one competitive area. The Commission rejected Petitioner's assertion on the grounds that Andros Island was not within the "local commuting area" of West Palm Beach and, therefore, not in the same "competitive

area" as defined in 5 CFR 351.402. Appendix Page A-6. Petitioner contended that the Commission erred as to the definition of competitive area for the regulations define it to be one in which employees are assigned to a "single administrative authority". 5 CFR 351.402. The standard is met if it covers a local commuting area which means the geographic area that constitutes one area for employment. The definition states as an example it may be the area where people can reasonably be expected to travel back and forth daily but is not confined to this situation. 5 CFR 351.203(d).

AUTEC was a single administrative authority operating in West Palm Beach and Andros. Appendix Page A-27. There was extensive commuting between the two areas but notwithstanding this is not the criterion. The Commission's definition thus is contrary to the regulations constituting an abuse of its authority, as the Agency should have established a competitive area which encompassed the one administrative authority, viz., AUTEC.

C. *EVENTS SUBSEQUENT TO TERMINATION (Reemployment)*

On or about May 1972 the Agency interviewed Petitioner for the purpose of determining his opportunities for reemployment, and he was qualified for:

Mathematician	GS-12 and GS-13
Physicist	GS-12 and GS-13
Operations Research Analysi	GS-12 and GS-13

Digital Computor System Administrator	GS-12 and GS-13

Appendix Page A-66.

During that interview Petitioner specifically requested that his name be placed on all Government employment registers in Florida, and was assured by the Agency that they would comply with his request. Appendix Page A-66. In addition, Petitioner filed with the Agency a form requesting that he also be considered for all vacancies in AUTEC, West Palm Beach and Andros Island; and NUSC in Newport, Rhode Island, New London, Connecticut, Patrick Airforce Base, Florida and Bermuda. Appendix Page A-73.

In its reply, the Agency alleged that in addition to "regulatory placement actions, placement consideration was extended to other NUSC competitive areas at appellants' request" in addition to referrals through the Department of Defense. Also the Agency alleged that it will make "vigorous effort" to assist terminated employees with skills and training to assist them in placement efforts with NUSC, and in other Naval and Federal activities in and outside the commuting area. Appendix Pages A-23, A-25.

On or about May, 1972, a lower retention status employee (Mr. Brackett), also subject to the RIF action, was offered a job at Cape Kennedy as a Mathematician GS-12. Petitioner asserts that since he is a veteran or preferential employee with a higher retention ranking, qualified for this position, the Agency should have first made this offer to him.

Furthermore, Mr. Brackett, was later transferred back to West Palm Beach. Appendix Pages A-67, A-76.

(1) *Violation Law and Regulations*

The Commission's decision, pertaining to (1) Petitioner's allegation that his reemployment rights were violated due to the fact that the Agency was advertising job vacancies for those positions which it qualified Petitioner for reemployment but made no offer and (2) to the fact that a lower retention standing employee was reemployed in preference to Petitioner, states that an employee is not entitled to assignment in another competitive area in a RIF nor is an Agency required to fill a vacancy under 5 CFR 351.201(b). Appendix Page A-8.

Referring to point (1), that an employee is not entitled to assignment in another competitive area in a RIF, this conclusion is totally without legal support or justification. The Commission cites no authority. However, to the contrary, the law and regulations directly hold that reemployment rights are extended to other competitive areas.

First, under Title 5 of the United States Code, the law requires that the Commission shall establish and enforce regulations to provide priority for reemployment to preferential eligibles (veterans). 5 USC 1302(b). Appendix Page A-36. Rule VII, Reemployment Rights, Civil Service Rules, The President of the United States orders the Commission to establish reemployment *rights* (emphasis supplied) for displaced persons in the agencies from which said

employees are released. Executive Order 10577, Rule VII-7.3, March 9, 1960, 25 F.R. 2076. Part 330, subpart B of the Civil Service regulations establishes a priority for filling vacancies in an agency and in summary they require that consideration shall first be given to the highest tenure group (I) and within the group preferential (A) over non-preferential (B). 5 CFR 330.101 — 330.204. Subpart C, Part 330 of the regulations establishes a Displaced Employee Program. Eligibles under this program include, among others, those employees subject to a RIF in which an Agency has determined that ". . . he cannot be placed in his competitive area". 5 CFR 330.301(a).

Therefore, in summary, the statute, Executive Order and regulations make no provision for limiting reemployment opportunities to a competitive area. Furthermore, the regulations affirmatively provide that reemployment opportunities be made to a displaced employee under a RIF procedure *outside* his competitive area. Although Part 351 of the regulations does limit reemployment rights to the competitive area, Part 351 and Part 330 together must be construed to give Petitioner, and all displaced employees under a RIF procedure, cumulative rights to reemployment, that is, within and without their respective competitive area. Therefore, the Commission's conclusion that "an employee is not entitled to assignment by reduction in force to another competitive area" directly conflicts with the law and regulations.

The Commission's second point is that although the Agency was advertising job vacancy which it qualified Petitioner for reemployment it is not required to fill a vacancy. The Commission cites 5 CFR 201(b). Appendix Page A-8. The Commission, deliberately or inadvertently, again misconstrued the regulations, for this particular one says that although an Agency is not required to fill a vacancy if, in its discretion, it does it must follow the remaining regulations under that part which requires that the Agency establish a reemployment priority list in the competitive area. 5 CFR 351.1001. Thus, the regulations do not require filling a vacancy with a displaced person but when it does it must select in retention status order.

Petitioner presented evidence that the Agency at the time of his severance was making public announcements that it was expanding its technical personnel in West Palm Beach. Record 221, 223. In addition, Petitioner presented evidence where the Agency's personnel forecast showed 77 positions whereas there were only 66 people employed at that time or there were 11 existing vacancies. Record 249, 254, 259. Appendix Page A-70. Furthermore, Mr. Brackett, the lower retention status employee hired as a mathematician GS-12 at Cape Kennedy, was transferred back to West Palm Beach. Appendix Page A-67. Thus, Mr. Brackett was "reemployed" in the competitive area over Petitioner with a higher retention standing which directly contradicts the requirements of the regulations.

In conclusion, Petitioner presented substantial, credible evidence where the Agency anticipated or did employ or reemploy displaced or other employees without giving consideration to Petitioner's preferen-

tial reemployment rights. Holding the highest rank and likewise being a veteran (IA) he held priority for reemployment. Yet, no job offer has been made to him.

(2) *Bad Faith*

The regulations require that both Agency and the Commission establish reemployment programs which as a minimum shall assure reemployment consideration in priority order. 5 CFR 330.302-304. The Agency stated in its reply that Petitioner was considered for reemployment in other competitive areas, and that "vigorous effort" will be made to assist Petitioner in obtaining requisite skill and training to qualify him for positions within the Agency, in other Naval and Federal activities, in and outside the commuting area. Appendix Pages A-23, A-25. Thus, as a minimum, the Agency was required to consider Petitioner for all vacancies in physics, electronics engineering, mathematics, operations research, digital systems; and the Agency's reply infers they did so but found no opening. Petitioner, on the other hand, presented substantial evidence that numerous employment opportunities were available. Appendix Pages A-57, A-58, A-76. Considering Petitioner's years of experience in these technical areas in conjunction with his extensive formal education does it not imply bad faith on part of the Agency when it found Petitioner unqualified for *any* job opening in his area of expertise? Furthermore, no training nor assistance for job qualification was offered to him. Appendix Page A-68.

The Commission, likewise, is obligated to provide reemployment opportunities under a priority program, and as indicated above opportunities are not restricted to any particular geographic location. 5 CFR 330.303-306. However, Petitioner was informed by the Commission that he was placed on two employment registers only, Huntsville and Mobile. Appendix Page A-74. Due to job terminations in these two locations, Petitioner considered his reemployment opportunities nil. Appendix Page A-67.

Conclusion

(1) The Commission's decision holding that a displaced employee under RIF procedure is not entitled to reemployment in another competitive area is in contradiction to the law and regulations.

(ii) The Commission's decision that an Agency is not required to fill a vacancy is misleading and incomplete. It fails to include the situation where an agency does fill a vacancy and under these circumstances it is obligated to give priority to displaced employees in retention standing order. Petitioner presented substantial evidence that the Agency did or intended to reemploy others in preference to Petitioner who held preferential priority.

(iii) Petitioner also presented substantial, credible evidence that the Agency acted in bad faith. The Agency is obligated to establish a reemployment program. The Agency stated it considered Petitioner for vacancies within the Agency as well as other Naval and Federal activities, in and outside his commuting area.

Yet, during this period the Agency was advertising numerous openings in positions it qualified Petitioner, but made him no job offer. The Agency further stated it would make vigorous effort to assist Petitioner in qualifying and training him for other jobs, but to date has offered Petitioner no opportunity for training.

(iv) Petitioner also presented substantial, credible evidence that the Commission acted in bad faith in that it likewise is obligated to establish a reemployment program unrestricted as to geographical location. However, the Commission placed Petitioner on two placement registers only, Huntsville and Mobile, where the possibilities for reemployment were limited.

Point I

The Order Of The Court Of Claims Is In Conflict With Federal Statutes, Executive Rulings, And Civil Service Regulations.

The legislative scheme embodied by Federal statutes, Executive rulings and Civil Service regulations has as its primary purpose the protection of United States Government employees against arbitrary and unjust action by an employing Government agency or department, and affording preferential employees (normally veterans) preference in appointment, retention, reinstatement and reemployment.

Congress has enacted a statute which grants to the President of the United States the power to promulgate rules for the administration of Governmental competitive service. 5 USC 1301. Congress commands the Civil Service Commission to prescribe regulations, subject to Presidential rules or Executive Orders, to implement the administration of the competitive service; and further commands the Commission to prescribe and enforce regulations to implement Congressional policy of providing preferential employees preference in appointment, retention, reinstatement and reemployment. 5 USC 1302 (a), (b). Appendix Page A-36.

Pursuant to the Presidential rule making power, President John F. Kennedy issued an Executive order directing each Government department and agency as well as the Commission to establish procedures and regulations for the purpose of safeguarding Government employees against arbitrary or unjust discharge. Executive Order No. 10987, *Agency Systems for Appeals From Adverse Action*, Jan. 18, 1962, 27 F.R. 550. Therefore, each Government employee is protected from arbitrary and unjust severence, and each preferential employee in addition to protection from arbitrary and unjust termination is eligible for preferential consideration in appointment, retention, reinstatement and reemployment.

Petitioner alleges in his facts that his discharge from competitive service was arbitrary and unjust; and as a preferential employee, in violation of the laws and regulations, he was not granted preference by the Agency nor the Commission in retention, reinstate-

ment and reemployment. The Agency and the Commission's actions in this regard are arbitrary and unjust for the following reasons.

(A) The Agency and Commission did deliberately deceive Petitioner which directly contributed to his separation from Government service and denial of his reemployment rights.

(B) The Commission's decision, upheld by the Court of Claims, was not made on the basis of any credible evidence to support the Agency's reasons for discharge and failure to reemploy.

(C) The Commission's decision, upheld by the Court of Claims, is in violation of Federal statutes, Executive rulings and Civil Service regulations.

(A) *Deception*

Deceptive statements and acts of the Agency and Commission as appear in detail under the Statement of Facts are summarized as follows:

1. The Agency assured Petitioner that if he transferred to West Palm Beach his job was secure when it knew that he was slated for discharge. Petitioner would not have requested reassignment had he been so informed, thus would not have been subject to the RIF procedure. Brief, Page 8-12.

2. The Agency, although stating Petitioner was considered for reemployment, advertised vacancies

for positions it qualified Petitioner for reemployment, but made no job offer to him. Brief, Pages 23-30.

3. The Agency misrepresented Petitioner's qualifications which precluded him from exercising his preferential retention rights. Brief, Pages 19-22.

4. The Agency deliberately hired a non-veteran for a job which it qualified Petitioner in preference to Petitioner who under the law and regulations held priority. Brief, Pages 24-25, 27.

5. The Agency stated it would make vigorous effort to qualify and to train Petitioner for other positions but offered him no training. Brief, Pages 24, 28.

6. The Commission, under its reemployment program, in violation of the regulations, placed Petitioner on two job registers only, Huntsville and Mobile, directly contrary to Petitioner's request. These places were considered by Petitioner to have nil employmental opportunities. Brief, Page 29.

7. The Commission and the Agency failed to furnish Petitioner with a copy of the Agency's reply to his appeal. Also the Agency told Petitioner that it was abolishing his position but replied to the Commission that it transferred his functions to RCA. Brief, Pages 5 and 6.

(B) *Decision of Commission and Order of Court of Claims Totally Devoid of Evidentiary Support*

The Statement of Facts reveal that the only evidence submitted by the Agency to the Commission consisted

of an unsworn statement. The Commission predicated its decision solely upon this statement, and the Court of Claims held that the administrative action was supported by "substantial evidence". Petitioner, on the other hand, did present substantial, credible evidence consisting of documents, letters, instruments, and sworn affidavit contradicting the Agency's allegations. Brief, Pages 13-18.

Where a discharge has been unsupported by substantial, credible evidence it will be regarded as arbitrary and invalid. *Urbina v. U.S.*, 180 Ct. Cl. 194 (1967). *Saggau v. Young*, 138 F. Supp. 140 (D.C. D.C., 1956). Examples of substantial evidence consist of testimony of two witnesses and affidavits of three affiants (*Williams v. Brown*, 384 F. 2d 981 (C.A. D.C., 1967)): copy of transcript, evidentiary letters prior to discharge stating cause, testimony before a trial examiner by numerous witnesses accompanied by a written summary. *Gordon v. Bright*, 306 F. Supp. 252 (D.C. Okla. 1968).

Since Petitioner was not afforded a hearing by either the Agency or the Commission there is no transcript of testimony. Neither is there any documentary evidence, letters nor sworn statements supporting the Agency's action. Predicating Petitioner's discharge upon no evidence constitutes an arbitrary discharge which is unlawful.

(C) *Decision of Commission and Order of Court of Claims Contrary to Law and Regulations*

The Statement of Facts reveal that the Agency established a competitive area and competitive level for

purposes of retention so narrow and contrary to the regulations, as to effectively preclude Petitioner from exercising his preferential retention rights. Brief, Pages 19-23. The Commission also erred under the law and regulations in holding that Petitioner was unable to exercise his preferential reemployment rights. Brief, Pages 25-28. Neither the Agency nor the Commission granted Petitioner a hearing. Brief, Page 13.

When a Government employee has been deprived of his rights under the law and regulations it must be regarded as if the employee has not been lawfully discharged. *Saggau v. Young*, supra; *Williams v. Brown*, supra; *Baxter v. United States*, 136 F. Supp. 748, (Ct. Cl., 1954), cert. denied 1/9/56, 76 S. Ct. 308. Government employees subject to an adverse action are entitled to a hearing either before the Agency responsible for the discharge or the Commission. Exec. Order 10987, supra; *Williams v. Brown*, supra; *Sampson v. Murray*, 94 S. Ct. 937 (1974).

In conclusion, a discharge which is based on deception, not supported by any evidence, and contrary to the law and regulations is arbitrary and unjust, thus unlawful.

Summary Judgment

The Court of Claims ruled in favor of Respondent's motion to dismiss and for summary judgment. Brief, Page 7. Petitioner alleges that Respondent's motion for summary judgment was improper.

If the judgment sought shows, on pleadings, depositions, answers to interrogatories, affidavits, that there is no genuine issue as to a material fact, the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56(c). The party opposing the motion must set forth specific facts showing there is a genuine issue for trial, and where such materials raise inferences it is the duty of the trial court to view such inferences in favor of the party opposing the motion. Federal Rules of Civil Procedure, Rule 56(e). *United States v. Diebold, Inc.*, 82 S. Ct. 993 (1962).

Reiterating the points raised above, the Agency presented no evidence (depositions, answers to interrogatories, affidavits) in support of its allegation; yet Petitioner presented substantial, credible evidence raising a strong inference that his discharge and denial of reemployment was unlawful. Therefore, the Court of Claims erred in granting Respondent's motion for summary judgment.

Point II

The Question Involved Is An Important Issue Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This Court has not entertained any issues raised in this Petition for Writ of Certiorari since enactment of Executive Order 10987 in January, 1962. The Court did recently review one case involving a very narrow issue of law, not herein raised, viz., does loss of pay and reputation by a discharged employee constitute

irreparable injury to justify issuance of a temporary injunction. *Sampson v. Murray*, supra.

Petitioner asserts that the questions of arbitrary and unjust discharge and violations of Congressional policy concerning preference to preferential eligibles in reinstatement, reemployment and retention are equally important as the question decided in *Sampson*. This is particularly true since Executive rulings and statutes clearly set forth the philosophy and policy of the Executive and Congressional branches of the Federal Government. The responsibility of enforcing policy and law set forth in the statutes and regulations rests with the Federal courts.

The violations of law and abuse of authority by the Agency upheld by the Commission and Court of Claims are patent in this instance. President Kennedy stated that public interest requires ". . . maintenance of high standards of employee performance and integrity in the public service . . ." to promote the efficiency of the service. In furtherance of this goal, Government employees, who number nearly three million, are also to be protected against arbitrary and unjust action; and quick correction of improper, adverse acts will assist in maintaining a high level of employee morale and improve employee-management relations. Executive Order 10987, supra.

The rights of Government employees as well as all employees in their employment capacity are paramount. As Justice Douglas stated in the *Sampson* decision:

Employability is the greatest asset most people have. Once there is a discharge from a prestigious federal agency, dismissal may be a badge that bars the employee from other federal employment . . . a discharge on the basis of an employee's lifetime record or on the basis of captious or discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life . . . There is no frontier where that employee may go to get a new start. We live today in a society that is closely monitored . . . Discharge from the Federal service or resignation under fire become telltale signs of undesirability. *Sampson v. Murray*, supra at 955, 956.

Is not Petitioner the perfect example of this statement who, with over 29 years of Government service at approximately 50 years of age, finds himself unemployable despite his outstanding record and achievements in the technical and scientific world and who was so motivated towards excellence that he educated himself far beyond the minimum required for his job?

However, while Petitioner's plight is obvious in reality each one of us citizens and residents of this United States have suffered. Is not the purpose of the three million Government employees to serve us all? Is it not in our interest that we are served by the most skilled, dedicated, loyal members of our society? Are not all of us harmed when some supervisor, for whatever reason, causes us to lose the services of one such employee?

Is this case one of those rare occurrences unlikely to be repeated in the future which this Court can ignore? This conclusion is readily dispelled by reference to the "Malek Manual" published by the Federal Times in installments between October 16th and December 18th, 1974. As the Times reports, this manual was widely used by various agencies to subvert the merit system, to dodge Federal personnel law and to promote political patronage. Federal Times, Oct. 16, 1974, at 12, Col. 1. The manual index includes a section entitled "Techniques for Removal Through Organizational or Management Procedures" (Federal Times, supra at 13, Section III, 3.) which is headlined by the paper as "How to Make Your 'Employee-Victim' Quit". This section is reported in full in the December 8, 1974 edition Page 12.

President Ford has also expressed his concern over abuse of the merit system and patronage in Government service and has issued the following statement for heads of departments and agencies:

> *Memorandum for Heads of Departments and Agencies*
> Whatever else, recent experience has proven one thing about the federal government: It can continue to function and move ahead even under the most difficult circumstances. This is due chiefly to more than two million career civil servants who, day-in and day-out, give of themselves in a thoroughly dedicated and efficient manner to assure this continuity.
>
> These men and women act in the best traditions of the career civil service which has

demanded from them for more than 90 years the highest degree of professionalism and competence. In return, it has assured them of a competitive system free from political considerations either in their appointments or in their promotions.

I intend to keep it that way — and I call upon you to see to it that the merit principles contained in the Civil Service Act and the personnel laws and regulations are fully and effectively carried out in your department or agency. Appointments and promotions in the career service must not be made on the basis of either politics, race, creed or sex.

I have informed the chairman of the United States Civil Service Commission of my determination to keep the federal career service just that — a career service in which men and women can be accepted in the first place on their ability and promoted on their merit. I ask you to make sure your agency fully complies with both the letter and the spirit of the law in this regard.

GERALD R. FORD

Federal Times, Oct. 9, 1974, at 5, Col. 3.

CONCLUSION

Except under a reduction-in-force procedure, a preferential eligible employee may not be severed from Government service unless for justifiable cause. 5 USC 7512. Appendix Page A-37. The Agency did not

discharge Petitioner for cause. To the contrary, Petitioner's skills, dedication and loyalty are reflected in part by his voluntary participation in the Government incentive awards program. On or about March, 1972 or one month preceding his discharge Petitioner submitted a work improvement suggestion which in the first year of implementation would result in a $1 million cost saving, and he has been recipient of other awards in the past. Appendix Page A-65. On another occasion his superior informed him that the President of the United States commended the work of their group in processing in-water data on missile impacts. Appendix Page A-69. Therefore, Petitioner's zeal in serving our country is evident up to the moment of his termination.

A total of 5 individuals were subject to RIF in West Palm Beach, one of whom was transferred to Cape Kennedy. Four, including Petitioner, were discharged. The Agency personnel forecast for West Palm Beach totalled 77 employees, and overall the Agency employed in excess of 3,000 people. Record 248, 254. Yet, neither the Agency nor the Commission was able to find suitable employment for Petitioner inside the Agency employing some 3,000 nor outside the Agency in Government service employing nearly 3 million.

Petitioner states that the reorganization under the RIF procedure was a ploy to circumvent the law to the detriment of Petitioner and the people of the United States. Petitioner asks this Court to grant certiorari and reverse the Order of the Court of Claims.

Respectfully submitted.

William J. Beiswanger
Attorney for Petitioner
788 Lakeside Drive
North Palm Beach, Fla. 33408
(305-626-5500)

PROOF OF SERVICE

I, WILLIAM J. BEISWANGER, attorney of record for James O. Ming, Petitioner, herein depose and say that I served by mail three copies of this petition for Writ of Certiorari to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530, Respondent herein on this ___ day of June, 1975.

William J. Beiswanger
Attorney for Petitioner
788 Lakeside Drive
North Palm Beach, Florida 33408
(305-626-5500)

APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF CLAIMS

No. 155-74

JAMES O. MING

v.

THE UNITED STATES

Before NICHOLS, Judge, Presiding, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on defendant's motions, filed August 19, 1974, to dismiss and for summary judgment and on plaintiff's cross-motion, filed November 4, 1974 for summary judgment, having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, it is concluded that plaintiff has failed to state a claim upon which relief can be granted and that the administrative action is supported by substantial evidence and is not arbitrary, capricious or so grossly erroneous as to imply bad faith.

IT IS THEREFORE ORDERED that plaintiff's cross-motion for summary judgment is denied, defen-

dant's motions to dismiss and for summary judgment are granted and plaintiff's petition is dismissed.

BY THE COURT

/s/ PHILIP NICHOLS, JR.
Philip Nichols, Jr.
Judge, Presiding

Mar. 14, 1975.

UNITED STATES
CIVIL SERVICE COMMISSION

BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION
in the matter of

Mr. James O. Ming
West Palm Beach, Florida
Detachment of the Underwater Systems Center
Newport, Rhode Island

/s/ WILLIAM P. BERZAK
Chairman

January 19, 1973

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION

In the Matter of: James O. Ming

TYPE CASE: *Reduction in Force — Separation*

INTRODUCTION

A timely appeal was submitted to the Board in behalf of the above named appellant from a decision of the Commission's Boston Regional Office which sustained the Naval Underwater Systems Center, Newport, Rhode Island, with respect to the appellant's reduction-in-force action. (Appellant was stationed at West Palm Beach, Florida.)

STATEMENT OF THE CASE

By reduction-in-force notice dated April 7, 1972, appellant was informed that he was to be separated from his position of Physicist (General), GS-13. Appellant was not offered another position in lieu of separation, and the record shows that appellant was separated on June 28, 1972.

BOSTON REGIONAL OFFICE DECISION

In its decision dated August 11, 1972, the Regional Office found no irregularities in the procedures involved in the reduction in force. That office concluded that

appellant's separation was accomplished in compliance with Civil Service Reduction-in-Force Regulations.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

In his appeal to the Board, appellant has renewed the contentions raised at the Regional Office, taken exception to certain findings of the Regional Office, and alleged collusion and incompetency on the part of the Regional Office appeals examiner. Appellant's representations were furnished to the Agency, which declined further comment.

ANALYSIS AND FINDINGS

The Board has reviewed the entire appellate record developed and relied upon by the Commission's Boston Regional Office and has, in addition, considered the further representations submitted to the Board in this case.

In effecting a reduction-in-force action, an agency is obliged to comply with the mandatory provisions of Part 351 of the Civil Service Regulations. It is the responsibility of the Civil Service Commission, pursuant to its appellate authority, to review appeals from reduction-in-force actions to determine whether the appellant was properly within reach for release from the position to which he was officially assigned at the time of the reduction-in-force action; whether the reduction-in-force notice was timely and

otherwise in accord with the notice requirements in the regulations; and, if the appellant was so entitled, that he received a reasonable offer of assignment. The facts in appellant's case have been evaluated in the light of those requirements. If the agency correctly complied with the requirements, appellant's reduction-in-force rights have not been violated.

In view of appellant's contentions that the Regional Office's examiner failed to consider all of the facts in the case in reaching his decision; that he improperly interpreted the evidence; and that he did not give a fair and impartial evaluation of the facts, the Board has made a review of all evidence presented to the Regional Office, as well as that furnished to the Board.

In regard to an error having been made in the Regional Office's decision in listing a position as being held by an employee in subgroup I-B instead of II-B, the Regional Office acknowledged this error in a letter dated September 6, 1972, addressed to another appellant. This error did not affect the Regional Office decision, since the appellant in question was found not qualified for the position, and therefore it made no difference which subgroup the employee was in. If in fact appellant had been found qualified, he could have "bumped" the incumbent, whether he was in retention subgroup I-B *or* II-B.

Appellant contends that the Regional Office decision was contrary to the regulations and did not address itself to the original issue; namely, that all functions and positions of appellants are being abolished. Appellant contends that by engaging independent

contractors to perform the duties appellants had been performing, that the positions were not, in fact, abolished but rather transferred, and that the Regional Office's decision was invalid as a result.

The Board finds, from the record, that appellant's position was abolished. Abolishment of positions, and providing for the duties to be performed by independent contractors, are matters of agency prerogative and not subject to appellate review by the Commission.

Regarding appellant's contention that his competitive area was too narrow, the Board finds that Andros Island, a 50-minute plane flight away in the Caribbean Ocean, is not within the local commuting area of West Palm Beach, Florida, so as to meet the requirements of Section 351:402 of the Civil Service Regulations for a single competitive area. A commuting area is the area within which most employees normally commute to work; and the fact that some employees fly back and forth to Andros Island on official business, or may even commute, does not establish Andros Island as being within the "local commuting area" of West Palm Beach, Florida.

Regarding appellant's contention that his competitive level was too narrow, appellant's competitive level of Physicist, GS-1310-13, appears to have been established in accordance with the requirements of Section 351.403 of Part 351 of the Civil Service Regulations. Specifically, the Board finds that the positions of Physicist, and those of electrical or electronic engineering, do not meet the requirement of mutual

interchangeability so as to belong in the same competitive level.

Appellant has renewed the contention that he is qualified for a position of Operations Research Analyst, GS-13. The qualifications required for assignment are set out in the Federal Personnel Manual, Chapter 351, Subchapter 7-6, which makes it clear that basic qualification, i.e., eligibility for appointment, is not sufficient for entitlement to displace another employee. In order to be qualified for assignment, an employee must be as well qualified for the position as if he had performed in another position very much like it, because he must be able to take over all of the duties and responsibilities of the position without undue interruption to the activity. That is to say, he must do so with only brief orientation and with only normal supervision, without significant training.

The Board, from its review, concurs in the finding of the Regional Office that appellant was not qualified, within the meaning of the aforementioned section of the Federal Personnel Manual, for assignment to the position of Operations Research Analyst, GS-13.

Regarding appellant's contention that there were jobs available at Cape Kennedy to which he feels entitled, the Board notes that Cape Kennedy is in a competitive area different from that of appellant, and an employee is not entitled to assignment by reduction in force to another competitive area. Consequently, the fact that another employee was given a position at Cape Kennedy is not relevant to appellant's case.

With respect to appellant's contention that there were vacancies to which he could have been assigned, Section 351.201(b) of the Civil Service Regulations states that an agency is not required to fill a vacancy in a reduction in force.

With regard to appellant's allegations of collusion and incompetence on the part of the Regional appeals examiner, the evidence of record supports the examiner's findings; and absent evidence to support the allegations, the Board finds these allegations warrant no further consideration.

The Board has reviewed appellant's additional representations and finds them to be matters not relevant to the adjudication of appellant's reduction-in-force action.

DECISION

The Board of Appeals and Review, after reviewing the entire record in this case, finds no violation of appellant's reduction-in-force rights. Accordingly, the decision of the Commission's Boston Regional Office is affirmed.

Section 772.307(c) of the Civil Service Regulations provides that decisions of the Board are final and there is no further right of administrative appeal.

For the Commissioners:

/s/ WILLIAM P. BERZAK
William P. Berzak
Chairman

January 19, 1973

United States Civil Service Commission
Director, Boston Region
U.S. Service Commission
John W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

August 15, 1972

Mr. James O. Ming
226 Cascade Lane
Palm Beach Shores, Florida 33404

In Reply To:
HG:dp

Dear Mr. Ming:

This refers to the reduction in force appeal which you filed jointly with four other employees of the Naval Underwater Systems Center, West Palm Beach Detachment, West Palm Beach, Florida.

The limits of the jurisdiction of the Civil Service Commission in a reduction in force appeal were explained to you in a letter of acknowledgment dated June 12, 1972. As we indicated in that letter, it is the responsibility of each agency and not of the Civil Service Commission to decide when to carry out a reduction in force and what positions to abolish. Decisions of the employing agency in these areas are not subject to review by the Civil Service Commission but rather, the function of this office is to see to it that the employee has been properly reached for action in his competitive level, and that the Regulations of the Civil Service Commission governing reductions in force are correctly applied in effecting his separation or position change because of reduction in force.

In response to our letter, you completed our Form 508, Reduction in Force Appeal-Request for Additional Information, in which you indicated your grounds for appeal. You contended that your competitive area was too narrow, that your competitive level was too narrow, that you were improperly reached for separation from your competitive level, that an exception to the regular order of selection was made in your case, and that you believed that you are qualified to "bump" other employees in lower tenure subgroups.

With respect to the specific points which you raise, your agency advised us that the competitive area consisted of the entire activity known as AUTEC, West Palm Beach, Florida. The other competitive areas established under the Naval Underwater Systems Center, Newport, Rhode Island, are at New London, Connecticut, Newport, Rhode Island, Bermuda, Patrick Air Force Base, Florida, and the Andros Island. Since each of these establishments is clearly in a different geographical location beyond the commuting distance of any of the other installations, the Underwater Systems Center was correct in establishing each of these localities as a separate competitive area. That decision was in accord with provisions of Section 351.402 of the Commission's Regulations wherein it states that a competitive area in the field service meets the standard in that section when it covers a field installation in the local commuting area.

With respect to the next point raised in your appeal, the records furnished us show that you were reached for reduction in force in the competitive level of

Physicist (General) GS-1310-13. Your agency furnished us a complete listing of all retention registers for all competitive levels in the competitive area. Our review of that listing shows that no employees were retained in positions of Physicist (General) GS-1310-13. Consequently, there is no possibility of holding that your competitive level was unduly narrow. Section 351.403 of the Commission's Regulations defines a competitive level as consisting of all positions in the competitive area in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency may readily assign the encumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work progress. Clearly positions of Physicist (General) GS-1310-13 are sufficiently different from positions in any other occupational series.

The information furnished to us shows that you were the only employee in a position of Physicist (General) GS-1310-13 and therefore there can be no merit to your claim that you were improperly reached for separation from your competitive level. So too, the retention records furnished to us failed to show that any employee was retained as an exception out of the normal order of selection as no employees were continued in positions of Physicist (General) GS-1310-13.

Thus, we have established that you were reached for reduction in force action in the normal order of selection as a career employee with veterans preference, in retention subgroup IA, in a competitive level and

within a competitive area which satisfy the Commission's standards for such. You were issued a written reduction in force notice of not less than 30 days dated April 7, 1972, informing you that you would be separated because of reduction in force on June 16, 1972. The only other question for our consideration is whether your placement rights in a reduction in force were violated by your agency's failure to offer you a position change to another position held by an employee in a lower retention subgroup in lieu of separation. We have carefully examined your qualifications as reflected in the record of experience and training which you furnished to us and in the light of the titles and series of positions occupied by employees in retention subgroup I-B in the competitive area at grades GS-13 and below.

Electronic Engineer	GS-855-13
Operations Research Analyst	GS-1515-13
Electrical Engineer (Facilities/PW oriented)	GS-850-12
Administrative Officer	GS-341-11
Contract Audit Assistant	GS-501-9
Office Services Supervisor	GS-342-8
General Engineer	GS-801-7
Management Technician	GS-344-7
Public Information Specialist	GS-1081-7

The record of experience and training which you furnished to us shows that your major educational study was in mathematics and physics and your principal fields of work experience have been in computer data processing. Your agency has found that of the above positions, you meet the minimum requirements for

Operations Research Analyst, GS-1515-13. We concur in that determination.

With respect to the position of Operations Research Analyst, your agency has stated that the particular position at AUTEC requires extensive experience in conducting broad programs involving complex systems engineering analysis of undersea and in-air tests of advanced weapon systems; in-depth analytical experience involving simulation and modeling in the "real world"; task leader experience; and utilization of such advanced analytical techniques as time series analysis, multiple regression and linear, dynamic filters and failure probability models. Mr. Ming's particular combination of experience and education does not indicate the level of analytical capability required, or the experience with conduct of broad programs involving complex systems engineering analysis, or experience as a task leader in an operations research oriented team. It has been estimated by cognizant technical/line personnel that were Mr. Ming to be offered this position he would require lengthy additional training and orientation and it would be in excess of two years before Mr. Ming would be functional in the position in question. Therefore, in accordance with the guidelines provided by FPM 351, Subpart 7-6b relative to qualifications determinations of displacement it was determined that Mr. Ming is not qualified for this particular position. Based on our review of the record which you furnished us, we agree with that determination.

We find further that there are no positions in the competitive area held by employees in your retention sub-

group with lower retention preference standing which are the same as positions which you formerly held and from which you were promoted, so that you could not be offered a position change in the exercise of your "retreat" rights.

Finally, the information furnished by your agency clearly shows that there was a reorganization within the meaning of that term in the regulations of the Civil Service Commission in that certain functions of the AUTEC Data Activity were discontinued in-house and were to be performed by a contractor. Such a change of means or methods by which an agency accomplishes its mission constitutes a reorganization and gives rise to a reduction in force with respect to the positions which are abolished. We have carefully reviewed all the material submitted in the various exhibits in your behalf and in behalf of the other four employees who joined in your appeal but we find that, except as they pertain to any of the matters covered herein, they provide no basis for this office to disapprove the action taken in your case.

Accordingly, it is our decision that the action of the Naval Underwater Systems Center involving your reduction in force was carried out in accordance with the regulations of the Civil Service Commission in Part 351, governing reductions in force and is sustained. Your appeal is therefore denied.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U.S. Civil Service Commission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U.S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representations which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

For the Regional Director:

Sincerely yours,

/s/ HARRY GROSSMAN
Harry Grossman
Appeals Examiner

cc: Civilian Personnel Officer
Hdqts. Naval Underwater Systems Center
Newport, Rhode Island 02840

The Honorable Paul G. Rogers
House of Representatives
Washington, D.C. 20215

NAVAL ...DERWATER SYSTEMS CENTER
HEADQUARTERS
... NEWPORT, RHODE ISLAND 02840

841 - EXT.
AUTOVON 841 - EXT.
NEW LONDON, CONN. 06320
AREA CODE 203
442 - 0771 - EXT.
AUTOVON 836 - EXT.

IN REPLY REFER TO:
NA21:DC:mjc
7 APR 1972

MEMORANDUM FOR Mr. James O. Ming

Subj: Notification of Reduction in force

Ref: (a) FPM 351
(b) [illegible] 351
(c) FPM 330
(d) [illegible] 330

1. It is necessary to hold a reduction in force in your competitive level. The retention rights of all employees concerned have been reviewed. You will be affected as indicated below:

☒ SEPARATION ☐ REASSIGNMENT TO: _____

FURLOUGH ☐ CHANGE TO LOWER GRADE TO: _____

EFFECTIVE DATE OF THIS ACTION	LAST DAY OF ACTIVE DUTY IN YOUR PRESENT POSITION
16 June 1972	15 June 1972

2. The reason for this reduction in force is as follows:

Reorganization of AUTEC headquarters resulting in the abolishment of your present position.

3. Retention preference information concerning you is as follows:

SERVICE	COMPETITIVE AREA	
Competitive	West Palm Beach, Florida	
COMPETITIVE LEVEL	RETENTION SUBGROUP	
Physicist (General), GS-1310-13	IA	
TITLE	GRADE	SALARY
Physicist (General)	GS-13	$21,237 pa

THE OFFER OF ☐ REASSIGNMENT ☐ CHANGE TO LOWER GRADE, in paragraph 1 is in lieu of separation by reduction in force. Please show whether you will accept this offer by completing the form on page 3. Return the completed copy to the address shown below:

Return the copy not later than (date)	Failure to accept the offer within this time limit will be considered a declination. Then, unless other employment becomes available, you will be separated by reduction in force on: (date)

FOR GROUP I EMPLOYEES ONLY:

☒ There are no group III employees in the competing area whom you have a right to displace.

FOR GROUP I EMPLOYEES ONLY:

☒ If a better offer can be made to you at another activity in the competing area it will be offered whether you accept or decline the offer in paragraph 1 (if one was made). If you do not want such consideration, please check [illegible] on page 3. You will be notified before [illegible]

AGENCY REPLY

Naval Underwater Systems Center
Headquarters
Newport, Rhode Island 02340

July 28, 1972

From: Commanding Officer, Naval Underwater Systems Center
Newport, Rhode Island 02840

To: United States Civil Service Commission,
John W. McCormack
Post Office and Courthouse, Boston,
Massachusetts 02109

Subj: Reduction-in-force Appeal

Encl:
(1) NUSCINST 12351.1A
(2) West Palm Beach, Florida Retention Register
(3) Notification of Personnel Actions (SF-50)
(4) List of Titles
(5) Comments on Statement of Appellants

1. In response to reference (a), the following information is provided. This information is applicable to all individuals concerned; i.e., Barnett, Bentley, Brackett, Ming, and Goble, unless otherwise indicated. Paragraphs below are numbered to correspond with the paragraphs in reference (a).

1. Since formal assumption of the AUTEC program by NUSC on 1 July 1971 the former AUTEC Headquarters at West Palm Beach, Florida, has functioned as a separate detachment of this Center. Its status as a separate competitive area is documented in enclosure (1).

2. Enclosure (2) is an annotated copy of the complete AUTEC retention register and indicates all actions taken during the current reduction-in-force.

3. Enclosure (3) constitutes the RIF notices, extensions thereto, and Standard Form 50's for the five individuals concerned. All notices were received by these individuals on Tuesday, 11 April 1972 but dated Friday, 14 April 1972. The notices were delivered in person in separate sessions attended by the individuals concerned; David C. Miller and Dennis B. Sullivan, Personnel Management Specialists; and C. S. Soliozy, Acting Code W (Directorate of which AUTEC Headquarters is an organizational element). There were no offers of assignment within the competitive area.

4. Not applicable.

5. All individuals concerned are in tenure group I.

a. and b. Relative to Messrs. Barnett, Bentley, and Ming the following positions exist at or below the representative rate and in a tenure sub group lower than theirs. Due to a clerical error Mr. Barnett's position appeared as GS-1520-14; however, the correct

competitive level is GS-1520-13 and this was utilized in reduction-in-force considerations.

Electronic Engineer	GS-855-13
*Operations Research Analyst	GS-1515-13
Electrical Engineer (facilities/PW oriented)	GS-850-12
Administrative Officer	GS-341-11
Contract Audit Assistant	GS-501-9
Office Services Supervisor	GS-342-8
General Engineer	GS-801-7
Management Technician	GS-344-7
Public Information Specialist	GS-1081-7

*Of the three men above, only Mr. Ming is considered to meet the minimum experience and training requirements to qualify for an Operations Research Analyst, GS-1515-13 position.

Relative to Mr. Brackett, a GS-1520-13, 1B, the following position exists at or below the representative rate and in a lower retention sub group.

Operations Research Analyst,	GS-1515-13

Relative to Mr. Goble, a GS-334-12, 1A, the following positions exist at or below the representative rate and in a lower tenure sub group.

Electrical Engineer (facilities/PW oriented)	GS-850-12
Administrative Officer	GS-341-11
Contract Audit Assistant	GS-501-9
Office Services Supervisor	GS-342-8

General Engineer	GS-801-7
Management Technician	GS-344-7
Public Information Specialist	GS-1081-7

c. Mr. Ming meets the minimum qualifications for Operations Research positions. However, the particular position at AUTEC requires extensive experience in conducting broad programs involving complex systems engineering analysis of undersea and in-air tests of advanced weapon systems; in-depth analytical experience involving simulation and modeling in the "real world"; task leader experience; and utilization of such advanced analytical techniques as time series analysis, multiple regression and linear, dynamic filters and failure probability models. Mr. Ming's particular combination of experience and education does not indicate the level of analytical capability required, or the experience with conduct of broad programs involving complex systems engineering analysis, or experience as a task leader in an operations research oriented team. It has been estimated by cognizant technical/line personnel that were Mr. Ming to be offered this position he would require lengthy additional training and orientation and it would be in excess of two years before Mr. Ming would be functional in the position in question. Therefore, in accordance with the guidelines provided by FPM 351, Subpart 7-6b relative to qualifications determinations of displacement it was determined that Mr. Ming is not qualified for this particular position.

d. Enclosure (4) represents a list of titles of all positions from or through which the appellants were

promoted which are at or below the representative rate of their present positions.

e. There are no positions in the competitive area as listed in d above or any similar positions occupied by employees with lower retention standing.

f. Not applicable.

6. Not applicable.

7. Enclosure (5) represents this activities comments position relative to the statement of the appellants. Paragraphs in the enclosure are lettered to correspond with the lettering in appellants' statement.

/s/ JOSEPH E. DOUCETTE
JOSEPH E. DOUCETTE
By direction

NAVAL UNDERWATER SYSTEMS CENTER
Newport, Rhode Island

NUSCINST 12351.1A
MA32:ELM:kmr
13 Mar 1972

NUSC INSTRUCTION 12351.1A

From: Commanding Officer
Subj: Reduction in Force
Ref: (a) FPM 351
(b) CMMI 351

1. *Purpose.* To publicize the designation of competitive areas for reduction in force to comply with the requirements of reference (a) and in recognition of the legitimate interest of NUSC employees.

2. *Cancellation.* NUSC Instruction 12351.1 is hereby cancelled.

3. *Background.* Reduction in force may be necessary on occasion for such reasons as lack of work or funds, changes in positions resulting from reorganizations, changes in positions resulting in downward classification, or the need to make room for an employee with reemployment or restoration rights.

4. *Competitive Level.* Jobs so similar in all important respects that an employee can move from one to another without significant training and without unduly interrupting the work program. Example: All Clerk-Typists, GS-3, are in the same competitive level.

5. *Procedures.* Reduction in force will be conducted in accordance with the provisions of references (a) and (b). Separate competitive areas are established for each detachment of the Center as follows:

Newport, R.I.
New London, Conn.
AUTEC, West Palm Beach, Fla.
Bermuda
Complex 30, Patrick Airforce Base, Fla.
AUTEC, Andros Island

Employees will compete for retention within the competitive areas specified above. Employees who are attached to one of the detachments specified above, and whose duty stations are in different geographic locations than the detachment will be considered as part of the detachment for RIF purposes. Any employee involved in a reduction in force will be advised at that time of all his rights including the right to inspect pertinent regulations and records and the right of appeal to the Civil Service Commission.

Enclosure (1)

6. *Special Placement Efforts.* In the event of a reduction in force in any competitive area, vigorous effort will be made to assist employees with the requisite skills and training to obtain continuing positions that may become available within the overall Center, in other Naval and Federal activities in and outside the commuting area, and, where necessary, in private industry.

/s/ R. T. LUNDY
R. T. LUNDY

Distribution:
List 4

COMMENTS ON STATEMENT OF APPELLANTS

a. WPM 351 subpart 2-6 defines reorganization for reduction in force purposes in these terms "a

reorganization occurs when management at any level adds to, takes from, or redistributes the functions or duties of one or more positions". The major duties and responsibilities associated with the AUTEC Data Function with which the five appellants were identified were in fact abolished. Technical duties and responsibilities are now performed by RCA contractor employees, while some minor administrative functions such as signing of reports, approval of contractor documentation and the like are now performed by other AUTEC employees as required. The RIF, therefore, was properly applied and based on a valid reorganization.

b. There were no substantive errors made in tenure groupings. Only one error in references existed. Attachment II to the RIF notices cited as obsolete instruction, i.e., SECNAV INST 12351.3 of 24 September 1963, pertinent to voluntary extension of notice period. This was an informational attachment and it was explained to all appellants at the time of initial receipt of the RIF notice that the reference was obsolete and had been incorporated into the provisions of CMMI 351.8. The attachment was utilized merely to provide a form for requesting voluntary extensions as well as to remind them that this provision did exist.

AUTEC Headquarters was disestablished as a separate command and transferred in toto to NUSC management on 1 July 1971. It has remained intact as a separate detachment.

All retention rights of the individuals were properly considered. In the absence of any specific claims on

the part of the appellants we cannot address their statement further.

c. Competitive area and competitive levels for AUTEC Headquarters were established in consonance with current NUSC practice as indicated by enclosures (1) and (2). It is the determination of Center management that the competitive areas and levels provide NUSC employers with fair and equitable consideration. Again, the lack of any specific contentions by the appellants prevents further reply.

d. As indicated in the basic letter and as is evident by enclosure (3) all required notification prior to effecting the separation actions was given appellants. Appellants received individual and group counseling sessions on 11/12 April 1972 for the purposes of explaining the basis of the action, tenure group rights, placement considerations, and other pertinent information. Throughout the course of the notification period, Mr. Miller and/or Mr. Sullivan were continuously available by telephone and in addition, periodically available in person to answer any questions and assist the appellants in any way possible.

Enclosure (5)

In addition to regulatory placement actions, placement consideration was extended to other NUSC competitive areas at appellants' request and private industries in the West Palm Beach area were contacted regarding appellants, in addition to the referrals

through the Department of Defense Stopper List System.

e. At no time were undue restraints placed on appellants. Again, lacking specific charges prevents further comment.

f. True. The basis for the RIF was due to a reorganization.

g. and h. These RIF actions were based on a six month study of AUTEC, its mission, its requirements, and its personnel implemented after NUSC assumed management on 1 July 1971. Participating in this study were Code W management and technical personnel, Personnel Management Specialists, and Management Analysts as well as appropriate AUTEC Headquarters management/technical personnel. These RIF actions represent a part of the decisions resulting from this study and it is believed that any and all actions resulting from this study are thoroughly considered, prudent, and in the best interests of AUTEC, NUSC, and the Navy. The appellants' professional qualifications, experience, and performance were considered both in this study and during the subsequent application of reduction-in-force procedures.

BACKGROUND STATEMENT

1. *HISTORY*

a. The Atlantic Undersea Test and Evaluation Center (AUTEC) was commissioned on 26 February

1967. At that time it was comprised of two elements; a group on Andros Island in the Bahamas, made up primarily of military who reported to an Officer-in-Charge (OIC), and a group at West Palm Beach, Florida comprised mostly of civilians which functioned as a headquarters. A Navy captain was the Commanding Officer and was in charge of both groups. The parent organization was the Naval Ship Systems Command (NAVSHIP-SYSCOM) in Washington, D.C.

b. A Contractor has the responsibility for operation and maintenance of test related and support equipment, and of performing other range functions. Responsibility for technical direction and management of the Contractor was originally the responsibility of the commanding Officer, AUTEC and his duly authorized representatives. On 1 July 1971 the West Palm Beach group was disestablished as a headquarters and the groups at both West Palm Beach and Andros were assigned to the Naval Underwater Systems Center (NUSC), Newport, R.I. as detachments. At that time, the Commanding Officer, NUSC, assumed the authorities and responsibilities which had previously been vested in the Commanding Officer, AUTEC, West Palm Beach, Florida.

2. *AUTEC MISSION*

a. Tests at AUTEC are conducted in waters adjacent to Andros Island known as the Tongue of the Ocean (TOTO). The AUTEC Ranges consist of three components; a Weapons Range, a Sonar Range, and an Acoustic Range. The primary mission includes the evaluation of undersea weapon systems and com-

ponents thereof, the measurement of ships noise characteristics, the measurement of ships performance, the calibration of ships instrumentation and evaluation of anti-submarine attack effectiveness of aircraft, surface ships, and submarines. Additional mission responsibilities include oceanographic studies, evaluation of advanced detection-location devices and in-air and in-water trajectory studies.

b. The operational capability of AUTEC must be sufficiently flexible to meet changing mission requirements due to the many different range users and the R&D nature of many test programs. However, one common factor to all programs is the importance of the data provided the user.

3. *DATA GROUP MISSION*

a. The responsibilities of the Data Processing Group may be stated briefly as follows:

(1) Provide Staff Supervision of the Contractor elements engaged in data processing activities;

(2) Prepare work assignments for the Contractor to perform special studies and/or tasks and monitor performance of same;

(3) Perform normal staff duties necessary to the proper accomplishment of the AUTEC mission.

b. The Staff Supervision of the Contractor's data processing activity entails:

(1) Providing guidance to the Contractor to assure that the job requirement is understood;

(2) Maintain cognizance of the Contractor's resources; people, equipment, facilities, procedures, etc., to assure that they are adequate (but not superfluous) to accomplish the assigned tasks;

(3) Observe how the Contractor does the job and how well he does the job;

(4) Prepare reports to higher management, providing information about the Contractor's performance and indentifying any potential problems together with recommended corrective action.

c. The Data Processing function, as used herein, is comprised of a sequence of inter-related sub-functions defined briefly as follows:

(1) Requirements Analysis — The task of taking the user's requirements and interpreting them in terms of data requirements. Frequently new requirements will necessitate mathematical and programming support.

(2) Mathematical Analysis — When a user requests a new data parameter or stipulates accuracies more stringent than an existing capability, new mathematical or statistical methods must be formulated in order that the computer can operate on the data to put it into the desired form.

(3) Programming — Once the equations have been evolved they must be coded into a form recognizable by the computer. The set of coded instructions (computer program) must be checked out and documented.

(4) Data Reduction and Analysis — When a computer program has been accepted as operational, it is available to the data reduction mathematician to use on test data to transform it into the form and format specified by a range user.

(5) Computer Operations — The computer work request is received from the data reduction mathematician, the necessary control information is key punched into cards, the data and computer program specified are retrieved from their respective libraries; the job is processed on the computer, and the results returned to the mathematician.

(6) Production Control — From the time the first raw data is entered into Data Processing until the final data item is logged out, an up-to-date record is maintained on all items. Permanent records are maintained on data that is issued.

d. The Data Group (Code 220) maintained an intimate familiarity with each of the above areas of activity in order to perform the Staff Supervision function.

4. *THE DATA PACKAGE*

As previously stated, the data package is the reason for the existence of the Ranges. The data is presented

in many forms and may be issued on any of several mediums. In many cases it is very voluminous.

5. *SUMMARY*

a. The mission of AUTEC and its role in testing and evaluation of weapons and weapon systems in an oceanographic environment plays an important role in the military readiness conditions to meet national emergencies as well as safety and protection for man and machine during emergencies. Historical information is obtained on oceanographic phenomenas that adds to the building structure of the oceanographic community. In performing the mission of AUTEC, each person plays an important part by using his professional training and experience to advance the technical community and promote mission success. Such test is, for the most part, unique to the Range User Requirement for obtaining developmental facts and evaluation results.

b. The degree of success of the AUTEC mission is measured in terms of the level of confidence the Range User has in the only range product offered, "DATA". The entire mission can be jeopardized if this product is not controlled and does not maintain the quality required for valid evaluation of the mission objectives. Based upon these important facts, the functions of the defendants were established to assure Users that the Data Product provided by the Range was of sufficient quality and that reliance and confidence could be assumed with each item of productivity.

c. Complete abandonment of all functions associated with the data processing is tantamount to

the abdication of a fundamental responsibility of the Range mission concept and could jeopardize the operational readiness of weapons and ships which is of paramount importance in case of national emergencies.

EXECUTIVE ORDER NO. 10987

Jan. 18, 1962, 27 F.R. 550

AGENCY SYSTEMS FOR APPEALS FROM ADVERSE ACTIONS

WHEREAS the public interest requires the maintenance of high standards of employee performance and integrity in the public service, prompt administrative action where such standards are not met, and safeguards to protect employees against arbitrary or unjust adverse actions; and

WHEREAS the prompt reconsideration of protested administrative decisions to take adverse actions against employees will promote the efficiency of the service, assist in maintaining a high level of employee morale, further the objective of improving employee-management relations, and insure timely correction of improper adverse actions;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution of the United States, by Section 1753 of the Revised Statutes (5 U.S.C. [former] 631) [now sections 3301 and 7301 of this title],

by the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.) [now section 1101 et seq. of this title], and as President of the United States, it is hereby ordered as follows:

Section 1. The head of each department and agency, in accord with the provisions of this order and regulations issued thereunder by the Civil Service Commission, and to the extent specified in such regulations, shall establish within the department or agency a system for the reconsideration of administrative decisions to take adverse action against employees. Information on the system shall be brought to the attention of all employees. Within the principles established by this order and subject to the broad guidelines contained in the regulations, each department and agency is authorized to develop such agency appeals procedures as may be appropriate to its own organizational requirements.

Sec. 2. (a) The Civil Service Commission shall, not later than April 1, 1962, issue regulations to put this order into effect and shall make a continuing review of the manner in which this order is being implemented by the departments and agencies.

(b) Nothing in this order shall be deemed to enlarge or restrict the authority of the Civil Service Commission to adjudicate appeals submitted in accordance with Chapter I of Title 5 of the Code of Federal Regulations.

Sec. 3. The Civil Service Commission in issuing regulations and the departments and agencies in

developing an appeals system shall be guided by the following principles:

(1) The appeals system shall be a simple, orderly method through which an employee or former employee may seek timely administrative reconsideration of a decision to take adverse action against him.

(2) Employees and representatives of employee organizations shall have an opportunity to express their views as to the formulation and operation of the appeals procedures.

(3) An appeal shall be in writing and indicate clearly the corrective action sought and the reasons therefor.

(4) The system shall provide ordinarily for one level of appeal, except that it may include further administrative review when the delegations of authority or organizational arrangements of the agency so require.

(5) An employee who has not previously had an opportunity for a hearing in connection with the agency decision to take adverse action shall, on his request, be granted one hearing, except when the holding of a hearing is impracticable by reason of unusual location or other extraordinary circumstance.

(6) The employee shall be assured freedom from restraint, interference, coercion, discrimination, or reprisal in presenting his appeal.

(7) The employees shall have the right to be accompanied, represented, and advised by a representative of his own choosing in presenting his appeal.

(8) The employee shall be assured of a reasonable amount of official time to present his appeal.

(9) An appeal shall be resolved expeditiously. To this end, both the employee and the department or agency shall proceed with an appeal without undue delay.

Sec. 4. The head of each department and agency is authorized to include provision for advisory arbitration, where appropriate, in the agency appeals system.

Sec. 5. (a) This order shall not apply to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Atomic Energy Commission, and the Tennessee Valley Authority.

(b) The Civil Service Commission, on the recommendation of the heads of the agencies concerned, may exclude classes of employees the nature of whose work makes the application of the provisions of this order inappropriate.

Sec. 6. This order shall become effective as to all adverse actions commenced by issuance of a notification of proposed action on or after July 1, 1962.

JOHN F. KENNEDY

§ 1302. Regulations

(a) The Civil Service Commission, subject to the rules prescribed by the President under this title for the administration of the competitive service, shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service.

(b) The Commission shall prescribe and enforce regulations for the administration of the provisions of this title, and Executive orders issued in furtherance thereof, that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the competitive service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

(c) The Commission shall prescribe regulations for the administration of the provisions of this title that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the expected service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

(d) The Commission may prescribe reasonable procedure and regulations for the administration of its functions under chapter 15 of this title. Pub.L. 89-544, Sept. 6, 1966, 80 Stat. 401.

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to —

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528.

12 January 1972

From: MING. James C.. Physicist. Code 220

To: Mr. Soliozy. Mr. Greichen. Mr. Murais

Subj: Work Functions for James O. Ming
(partial listing)

Encl: (1) List of Work Functions
(2) Most recent Position Description

1. As per your request. encls (1) and (2) are provided.

/s/ JAMES O. MING
James O. Ming

1. Performs data analyst functions on Andros Island. This includes reviewing data from all three ranges to assure a quality product for the Users.

2. Verifies and certify IBM maintenance invoices for payment. Maintain records as necessary.

3. Verifies and certify IBM lease equipment invoices for payment. Maintain records as necessary.

4. Set-up tentative maintenance schedule trips for the IBM representative on a yearly basis to Andros Island. Make arrangements for additional trips as nec-

essary for corrective maintenance. This includes getting the Reps on the AUTEC manefist.

5. Receive Equipment Operation Reports (CDC) and Incident Reports (IBM) from Andros Island. Check for compliance with contract provisions. Maintain record and files so that the actual work performed per invoices can be verified. Many times these EORS and IRs require additional information and or discussion with the operations personnel or maintenance representatives for clarification.

6. Receive CESR (invoices) for Andros Island. Check for billing accuracy and for compliance with contract provisions. (i.e. if the invoice is for the second call within a certain time period for the same trouble, the invoice is returned without processing for payment). The CESRs are verified at two different times prior to final payment. First, the incumbent accepts it as customer rep. and then forwards to the Vendor for cost information. The Vendor then returns it for final certification of services received. At present the incumbent performs this task. The invoice is then forwarded to NRFC for payment. Maintains records and files as appropriate for future reference.

7. Verifies and certify CDC maintenance equipment invoices (monthly.) Performs these functions while the computers and peripherals were — on lease also. Maintains records and files of all invoices.

8. Monitor the ADPE contracts with CDC and IBM. This includes advising appropriate people of equipment changes (i.e. installation date, acceptance date, etc.) In addition, follow the contract provisions in regards to operational acceptance testing which is usually 30 consecutive days with a ninety percent uptime requirement. If the equipment meets the conditions for acceptance, the incumbent signs the Vendors acceptance forms for the government. The same procedure is followed for the installation acceptance. In both cases, coordination with the Vendor is necessary. Maintains records of these events.

9. Monitor the ADPE maintenance for the two 3400 computers and peripherals and the two 1700 computers and peripherals and the IBM (Special Government Design) computer. Also the off-line government owned and leased equipment such as card punches, reproducers, sorters, etc. Maintain records of downtime.

10. Assist with the procurement of spare parts for all government owned ADPE equipment.

11. Assist with the procurement of computer supplies such as magnetic tapes, printer paper, cards, etc. This includes at past time periods making arrangement with other government agencies to borrow and or buy on an emergency basis until AUTECs supply could be replenished.

12. Collect and assemble data for ADPE reports under SECNAVINST 5238.1 to include:

a. ADP Identification
b. EDPE System Inventory
c. ADPE Component Inventory
d. Manpower and Cost-Total
e. EDPE System Acquisition History
f. EDPE System Function/Use
g. EDPE System Utilization

In addition, OPNAVINST 10462.11 requires a report containing magnetic tape estimates be submitted annually.

12. Arrange for shipment of ADP equipment to and from Andros Island. This includes obtaining shipping instructions from Vendors and making arrangements for crating and handling. Also, occasionally get involved with on and off loading this equipment at the Outport Cape Kennedy.

13. Initiate recommendations for procurement action on ADP equipment. This includes justification and recommended Vendors as well as equipment type (i.e. four 607 tape drives in 1968, 3406 data channels-two in 1968, Calcomp plotter in 1970, etc.)

14. Initiate recommendations for release of ADP equipment when it is not needed (i.e. 3682 Satellite Coupler 1971, 407 accounting machine, 1970).

15. Maintains records of computer and peripheral equipment uptime.

16. Initiate reimbursement credit requests for equipment that is inoperative for long time spans. This ap-

plied to lease and maintenance of ADPE with contract provisions therefor.

17. Maintain records of purchase versus lease for ADP equipment.

18. Establish criteria for computer saturation level so that more accurate planning can be made for computer loading.

19. Screen ADP excess equipment listing per OPNAVINST 10462.13 and initiate recommendations for procurring items needed to meet range committments or to replace leased equipment. Many leased items have been replaced with government owned equipment obtained from the Excess ADP Equipment Bulletin.

20. Monitor and evaluate the contractors performance in the data processing areas including computer operations and maintenance of government owned equipment.

21. Review range test documentation and identify areas in hardware and software that may require procurement action and or software modification or development to meet the requirement. In addition, review test documentation prior to publication to determine adequacy of the data for performing the data reduction and analysis functions. Work with the Program Managers in providing this data for the data section of the ODs.

22. Maintain files of ADPE contracts including the GSA contracts. Study the contractual provisions as related to AUTECs requirement and apply these provisions to daily efforts in the computer operations and maintenance areas.

23. Review range schedules to ascertain the future loading factor for computers such that saturated time frames can be identified and used in the final planning stages for range time.

24. Study problem areas within data processing and recommend solutions (i.e. in the computer rerun report for the daily and monthly listing, should reruns be high resulting from magnetic tapes, it would be investigated and the most probably reason ascertained and corrected.)

25. Maintain ADPE equipment history cards for each item of equipment in the inventory (government owned and lease). These cards are up-dated as changes are made.

26. Initiate requests to computer maintenance Vendor for Extended Maintenance coverage. This occurs quite frequently since range testing continues through weekends and outside prime shift time. It requires seven days advance notice per the contract in order to obtain this service.

27. Set-up preventative maintenance schedules (standard) per the contract and initiate changes as dictated per the range schedule. Maintain records of same.

28. In the past have generated many work assignments to the M&O Contractor in many areas such as: #131 — AUTEC Management Information System and Accounting Procedures; #52 — Computer Accounting Procedures; #82 — Equipment Utilization Report; #51 — Hydro-Acoustical Computer Programs, Specifications for; #45 — Underwater Sound Velocity Study; #42 — Hydrophone Cable Termination Study for Sites 3 and 4, etc.

29. Work with other government personnel and the M&O Contractor is establishing improved procedures for the step processes from acquisition to final issue of data to range users. Initiated the basic Range Data Retention plan and internal priority system for assigning the priority of each data item run on the computers. Initiated the computer management procedures used as guidance in computer operations.

30. Set-up the digital magnetic tape rehabilitation service with Patrick Air Force Base. This recently was discontinued as AUTEC procurred a CDC 690 magnetic tape certifier. This certifier is undergoing operational checkout presently while performing certification services. The incumbent is presently working with the M&O Contractor is establishing procedures and criteria for rehabilitating AUTECs tapes.

31. Initiated the AUTEC MAGNETIC TAPE REHABILITATION PROGRAM as per OIC letter ser 685 29 June 71. Presently expending time in implementing this program.

32. Work with Facilities and other interested depts in improving environmental control of computer rooms and the data processing areas. Recently provided input to Technical Officer concerning the security aspect of the data processing areas in compliance with Naval Security Manual and the Code of Federal Regulations, Title 41, Chapter 101 to End. This includes facility modifications as well as providing secure facilities at the down-range sites for storage of classified tapes being generated.

33. Receive discrepancy reports from the M&O concerning data processing problems occurring usually in or near real time. Follow-up on those that relate to my functions to improve operations and the quality of the product.

ELECTRONIC ENGINEER/PHYSICIST (DATA SYSTEMS)

I. *Introduction*

This position is that of Data Systems Consultant, Range Development and Operations Division, Headquarters, AUTEC, West Palm Beach, Florida.

The Atlantic Undersea Test and Evaluation Center (AUTEC) primary mission areas include the operational evaluation of advanced undersea weapon systems and weapon system components, the measurement of ship noise and acoustic target strength, the measurement of tactical characteristics of ships (surfaced and submerged), the calibration of developmental and operational sonar systems and transducers, the test of sonobuoys and other detection-

location classification systems, and, on a not to interfere basis, the evaluation of anti-submarine attack effectiveness of aircraft, surface ships, and submarines in competitive type training exercises. Additional mission areas include pressure effect studies, marine corrosion studies, shipboard systems alignment, oceanographic studies, acoustic propagation studies, target echo studies, acoustic signature studies, in-air and underwater trajectory studies, and evluation and test of deep submersibles. The Range Development and Operations Division is responsible for the design, development, acquisition, installation, and operation of all range data processing equipment and techniques for each of the three test ranges in the Tongue of the Ocean. The Bahamas Range Department, consisting of three test ranges operated and maintained wholly by a contractor and his own employees (about 300-400), is located on Andros Island, Bahamas.

II. *Major Duties and Responsibilities*

1. He is relied upon to be an authoritative source of information and advice on range data systems and equipment to insure adequate and proper data collection and processing for each range, proper maintenance procedures, and written operation procedures. He examines range user requirements, and plans, acquires, and controls the installation of new data processing equipment without needless delays and/or interruption to test schedules.

2. He performs staff advisory, consultation, and reviewing duties for planning, scheduling, directing, and coordinating technical direction and control of

engineering activities assigned to the division, from engineering analysis and conception stages to design, installation, development, maintenance, and replacement of range data processing equipment. Typical data processing equipment includes medium to large scale digital computers, analogue computers, and data collection and display equipment.

3. He is responsible to direct the determination of requirements for extension and/or expansion of existing range data processing systems through the study of incoming project requirement documents, departmental policy statements, and technical information published concerning state-of-the-art advancements in data processing techniques and equipment.

4. He will determine the need for, and initiate, regulations, policies, and procedures for the operation of specific data processing systems to the followed by the Range Operations and Maintenance Contractor. He will establish test programs and procedures to evaluate the overall integrated accuracy and capability of the range data collection and data processing systems at AUTEC.

5. He provides a permanent source of range data processing technical information for use in evaluation of range user operational plans by maintaining and upgrading all technical documentation pertaining to range data collection and data processing techniques and equipment. He reviews and coordinates technical inputs of associate engineers and mathematicians. He directs the preparation and

monitoring of contract specifications, and contracts, as required for the design, development, installation, checkout, operation, and maintenance of test range data collection and data processing equipment required by AUTEC. He reviews contractor performance reports from associate engineers and mathematicians and range staff personnel, and evaluates performance through on-site examination and investigation, and prepares integrated contractor performance reports with recommendations to the Head, Range Development and Operations Division.

6. He serves as an engineering consultant to associate engineers within the Division and to departmental staff, project management personnel, and project engineers on test range data collection and data processing equipment, and problems arising in connection with AUTEC programs.

7. He must be able to work effectively with staff and command level contacts throughout the Navy Department and Department of Defense, and periodically make contracts with staff level personnel in friendly foreign governmental organizations. This requires a technical stature which will permit the incumbent's decisions and recommendations to be accepted as sound decisions.

8. Other duties as assigned.

III. *Controls over the Position*

The incumbent reports to a Supervisory Electronic Engineer, GS-14, who is the Head, Range Development and Operations Division, Code A220. As a data

systems consultant he is provided only broad policy and objective guidance and is expected to review range user program planning estimates to determine future data collection and data processing requirements, and to perform his responsibilities substantially with little or no technical guidance. He will prepare and submit plans and recommendations to the Division Head for review primarily for conformance to policy.

IV. *Qualification Requirements of the Work*

The functions of this position require, for their satisfactory performance, knowledge and application of substantial professional background in electronic engineering and data systems beyond the acquisition of a Bachelor's Degree (or equivalent), preferably with emphasis in the area of underwater data collection, test range data collection, and data processing. Related experience in the area of physics is likewise required.

ADDENDUM TO THE POSITION DESCRIPTION OF JAMES O. MING

Mr. Ming is a consulting physicist to Headquarters, AUTEC in the area of Data Systems. Mr. Ming will provide consultation services in the area of data gathering, data formatting, data transmission, and data reduction equipment. He will provide expertise in analysis of optical data systems equipment and at-

tainable systems accuracy, and in the area of acoustics (Sound) radiation phenomena. He will provide consultation in the systematic solution of underwater space/time problems. The Data Systems equipment at AUTEC consists of several small radar scale digital computers, a common digital buffer, on-site radar data digitizing equipment, a real time digital data transmission system, and several geometric radar acoustic hydrophonic underwater tracking and data gathering.

/s/ V. P. WHEELER
V. P. WHEELER
Head, Range Dev & Op Div

Item 19-1
James Othel Ming 18 May 1922

Dates of Employment:
2 April 1967 to Present
Place of Employment:
U.S. Navy, Atlantic Undersea Test and Evaluation Center, Data Systems Branch, West Palm Beach, Florida/Andros Range, Bahamas

Job Title: Physicist

Description of work:

The Incumbent is assigned the technical responsibility for the position of Data Systems Consultant for the

three Ranges located on Andros Island in the Bahamas. In this capacity he performs staff surveillance over Range Instrumentation data to include: Radar, Cinetheodolite, In-Water Tracking Systems, In-Water Noise Measuring Systems and in addition, provides expertise in the Data Processing for the Weapons Range, Acoustic Range and Sonar Range including Computer Operations.

The following specific functions are performed by the Incumbent as related to the above mentioned Systems:

Develops procedures for processing of data for the three ranges per test exercise to insure that all requirements of the Range User are met expeditiously and at the least cost.

Reviews Range User requirements and determine if these requirements can be met with existing range resources. Recommend and set into motion action as necessary to procure hardware and or software to meet firm Program objectives.

Reviews and evaluates Test Documentation to assure compatability between Range User needs and range capabilities. Recommend and set into motion action as necessary to assure timeliness and a quality data product to the Range User.

Performs staff advisory functions and conducts reviews for range planning, scheduling and range engineering activities as assigned to the Data Systems Branch. This includes related functions as pertaining to processing of data, procurring

hardware, installation and checkout and maintenance of Data Processing equipment.

Responsible for conducting feasibility studies to determine the need for extension and or expansion of existing range data processing systems through the review of incoming project requirement documents, departmental policies, and technical information published concerning state-of-the-art advancements in data processing techniques and equipment.

Monitors the range contract as required for updating contract specifications. Reviews contractor performance reports and performs evaluation through on-site examination of data quality and timeliness of final results.

Reviews data processing procedures for radar systems, optical systems and in-water tracking systems and in-water acoustical systems and set into motion action to update as necessary to expedite the data flow beginning with the collection of raw data to the final processed report.

Incumbent assumes the responsibility for staff surveillance and advisory functions in the computer operations area. This includes maintaining a continuous monitoring function of the step processes in handling data through the computer operations work areas of the AUTEC Ranges. Makes reports to higher echelons on computer utilization, automatic data processing equipment gains and losses, costs and type of work functions

performed by the computers. Maintains accurate inventory of all on-board computers and peripheral equipment including film reading equipment. Evaluates range requirements with reference to whether the range hardware can meet the User needs. May recommend changes to hardware and or software to meet new or changing requirements or to improve the Range's capability.

Maintains contact with hardware venders in the computer and peripheral and film reading equipment field. Frequently talk to hardware and software representatives to evaluate the range's capability in regards to state-of-the-art methods and equipment. May recommend changes to configuration to reflect higher efficiency from man and machine.

Prepared the AUTEC Computer Management Control Procedures which provides the Contractor with guidance in computer and peripheral equipment operation. Work closely with the Range Contractor in both the hardware and software areas to promote higher efficiency and reduce cost to the Government.

Item 19-1 contd
James Othel Ming 18 May 1922

Dates of Employment:
December 1969 to December 1971

Place of Employment:
This was a change of duty station within the same Command to Andros Island Bahamas

The Incumbent is assigned to the Range Operations area of the Andros Range Operation. The respon-

sibilities in this area includes: operation of the computers (5), on-line peripherals, off-line peripherals, plotters, maintenance of the government owned and leased equipment, configuration changes, administrative tasks associated with Automatic Data Processing Equipment to include ADPE Reports to higher echelons concerning utilization, costs, downtime, manpower, supplies, and performance. These computers are used in the Real Time and Post Test modes for processing data on the Weapons Range, Sonar Range and Acoustic Range. My work functions not only include the monitoring of the Maintenance and Operations Contractor but to maintain a working knowledge of the total functions performed in Data Processing. This includes being able to perform data reduction beginning with the raw data to the final product issuable to Range Users, analysis of the raw, intermediate and final data product to determine the overall quality of the results, production control to include the safe handling of all data acquired and issued and a good understanding of the software used in the production of data. These working functions encompass the in-air and in-water data for the weapons and sonar ranges and acoustic noise measurements data for the acoustic range.

The Incumbent performs other functions as required to maintain an operational readiness status for the three AUTEC Ranges. These include:

Reviewing Range User requirements and determine if these needs can be met with existing range resources. May recommend and or initiate procurement action to meet User requirements.

Acts as an advisor to the OIC in the Data Processing and Technical areas of the Andros Ranges.

Makes reviews and conducts studies to improve the overall range capability in the Instrumentation and Data Processing areas.

Performs Contractor Evaluations to determine his overall performance in the respective areas of responsibility.

Reviews test documentation to include User generated and Range generated to determine adequacy and compatability between the User requirement and Range capability.

Monitors the ADPE lease equipment contracts covering computer and peripherals. Performs interpretative and management functions to assure that the GSA Contractual provisions are met.

Incumbent keeps abreast of GSA Contracts as well as contracts between computer and peripheral equipment vendors to assure compliance with all provisions of these contracts. "ON Call" service invoices are checked against contract provisions to determine if discrepancies exist between charges made and contract specifications. Verify and or certify all services received on invoices to insure that work has been performed as stated prior to making payment. Keeps records of equipment downtime (com-

puters and peripherals) and generate correspondence for recovery of funds from the vendors if equipment is inoperable for long periods of time through no fault of the government. Works with higher echelons in obtaining best lease and or maintenance contract to satisfy the needs at minimal expense to the government.

Incumbent works directly with computer and peripheral vendors, range contractor data processing manager, headquarters personnel and higher echelons in matters concerning equipment configurations, procurement or deletion of equipments, procurement of data processing supplies, operating procedures and service charges.

SUMMARY ADVERTISED AGENCY JOB VACANCIES

Record			
April 7, 1972, Record 206, 207			
1. Electronics Engineer	GS-12		*Patrick Air Force Base*
2. Physicist	GS-12		*Patrick Air Force Base*
3. Professional Engineer or Physicist			*Newport, Rhode Island*
4. Electronics Engineer	GS-12		*Patrick Air Force Base*
March 24, 1972, Record 209, 210, 211			
1. Electronics Engineer	GS-12		
Physicist	GS-11,12		
Mathematician	GS-11,12	46(72)	*Newport, Rhode Island*
2. Electronic Engineer, Physicist, Operations Research Analyst, Mathematician		50(72)	*Newport, Rhode Island*
3. Electronics Engineer	GS-13		*New London, Conn.*
April 14, 1972, Record 213			
1. Electronics Engineer	GS-12		*Patrick Air Force Base*
March 17, 1972, Record 218			
Physicist, Operations Research Analyst, Mathematician, Electronics Engineer	GS-11,12,13		*Newport, Rhode Island*

JOB VACANCIES

POSITION DUTIES AND REQUIREMENT	ADDRESS REPLY TO DUTY STATION	CLOSING DATE
Business and Industry		
*1 Supervisory Contract Specialist, GS-1102-14, $21,960 p.a. Head, Equipment/Services Acquisition Section A. Responsible for management of contract placement and administration within assigned area of responsibility and has the full range of supervisory responsibilities. Desirable experience in electronic and communication equipment, test equipment, technical services, and R&D. (a)	Commandant of the Marine Corps (Code ARC), Washington DC 20380	17 Apr 72
*1 Supervisory Contract Specialist, GS-1102-14, $21,960 p.a. Head, Equipment/Services Acquisition Section B. Responsible for management of contract placement and administration within assigned area of responsibility and has full range of supervisory responsibilities. Desirable experience in engineer and general property, weapons systems test equipment, technical services, and R&D. (a)	Commandant of the Marine Corps (Code ARC), Washington DC 20380	17 Apr 72
Physical Sciences		
*1 Physical Science Administrator, GS-1301.1-15, $25,583 p.a. Manager of the Acoustic Transmission Program. Provides technical advice for all aspects of environmental acoustics within the purview of the Long Range Acoustic Propagation Project. (d)	Director of Civilian Personnel, Office of Naval Research, Room 823, Ballston Tower #1, 800 North Quincy Street, Arlington VA 22217	31 May 72
*1 Physical Science Administrator, GS-1301.1-14, $21,960 p.a. Manager, Acoustic Application Program. Provides technical advice for environmental acoustic applications to ASW planning and system development. (d)	Director of Civilian Personnel, Office of Naval Research, Room 823, Ballston Tower #1, 800 North Quincy Street, Arlington VA 22217	31 May 72
*1 Geophysicist, GS-1313-13, $18,737 p.a. Scientific Officer in the Marine Geology and Geophysics Program of the Ocean Science and Technology Division. (d)	Director of Civilian Personnel, Office of Naval Research, Room 823, Ballston Tower #1, 800 North Quincy Street, Arlington VA 22217	31 May 72
*1 Oceanographer, GS-1360-14, $21,960 p.a. Director of the Ocean Biology Program. Initiates, organizes, coordinates R&D projects of relevance to the Navy in oceanic biology. (d)	Director of Civilian Personnel, Office of Naval Research, Room 823, Ballston Tower #1, 800 North Quincy Street, Arlington VA 22217	31 May 72
Mathematics and Statistics		
1 Operations Research Analyst, GS-1515-12 or 13, $15,866 or $18,737 p.a. PROMIS Laboratory, Naval Hospital, Naval Aerospace Medical Center. Provides technical advice and assistance to professional members of staff in design, development and adaptation of mathematical, statistical and computer techniques in the analysis, storage and retrieval of medical data. In addition to possessing a high level of competence in mathematics, systems analysis, and computer technology, applicants must possess biomedical experience in the adaptation of these disciplines. (d)	Civilian Personnel Office, Naval Aerospace Medical Center, Naval Hospital, Pensacola FL 32512	5 May 72
*1 Operations Research Analyst, GS-1515-12, $15,866 p.a. Task Supervisor. Plans and administers a contract research program in mathematical optimization. Consults widely with scientists in Navy laboratories and OPNAV, assessing future requirements in program area and advising on state-of-the-art techniques. Ph.D. degree or the equivalent and experience with naval problems and operations are desirable. Must be able to convey information to military personnel and have sufficient stature to gain acceptance by the scientific community. (d)	Office of Naval Research, Department of the Navy, Arlington VA 22217 (Attn: Code 740)	5 May 72
1 Mathematician, GS-1520-15, $25,583 p.a. Bioengineering Sciences Department, Operations Research Branch, Michoud Station, New Orleans. Responsible for development and conduct of all mathematical procedures and experiments dealing with descriptive dynamic models, correlation models, and statistical models utilizing statistical analysis, statistical decision theory (Bayes or statistic), linear analysis, nonlinear control theory, Fourier and Laplace transform technique, matrix, tensor and vector analysis, perturbation theory of trajectories. Requires Ph.D. in applied mathematics or equivalent training and experience. (d)	Civilian Personnel Office, Code N [illegible], Building 468, Naval Aerospace Medical Center, Naval Air Station, Pensacola FL 32512 Duty Station: New Orleans	

10 April 1972 No. 8(77)

BEST COPY AVAILABLE

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, the undersigned authority, JAMES O. MING, who after being duly sworn deposes and states:

1. On or about December, 1969, I transferred from AUTEC, West Palm Beach, Florida, to Andros Island, Bahamas. In July, 1971 AUTEC, West Palm Beach and AUTEC, Andros Island, Bahamas, was transferred to Naval Underwater Systems Center, (hereinafter referred to as NUSC, Newport, Rhode Island. On or about August, 1971, I was requested to return to West Palm Beach for conference with two representatives from the agency. (C.S. Soliozy and J.J. Griechen). They informed me they were the AUTEC management head of West Palm Beach and Andros. This conference lasted approximately two hours at which time I answered numerous questions regarding my job duties and functions on Andros Island. I outlined my overall responsibility as supervisor of several military enlisted personnel who were performing surveillance of data processing and downrange instrumentation of radar and in-water sites. The enlisted men reported directly to me. The agency representatives informed me that of July 1, 1971 I was employed by NUSC. Although I was no longer part of the data processing group in West Palm Beach, I informed the representatives that I worked closely with data personnel in my job since it was one of my responsibilities to determine that data work was performed expertly and timely, but that I primarily was accountable to the military officer in charge. The representatives expressed satisfaction with my overall performance, and told me that I was doing a good job and to keep up the good work. The general outcome of this meeting relieved my concern that with a

new command assuming control my job might be in jeopardy. To the contrary these representatives led me to believe that I had nothing to fear.

2. On or about September, 1971, Mr. Barnett (Manager Data Processing-West Palm Beach) and Mr. Yokum (Manager of Program Manager Branch-West Palm Beach) visited Andros. LCDR Adams (then Technical Officer on Andros) informed me that they met with him. LCDR Adams told me that the agency was concerned about improving the overall effectiveness of data processing, my prime area of responsibility on Andros. Mr. Adams also stated to me that I should be promoted and assigned as manager of the West Palm Beach Data Group on return to the U.S.A. upon termination of tour of duty on Andros.

3. On or about October, 1971, Mr. Yokum came to Andros and discussed with me for approximately one hour the data processing function of AUTEC and my pending transfer back to the U.S.A. in December, 1971. It appeared to me from the conversation that he was asking me if I wished to join his group and at that time I had given it favorable consideration. An Agency employee informed me that in his opinion Mr. Yokum was highly regarded by the Agency and had been promoted for his work. He joined the West Palm Beach Branch shortly before NUSC assumed control from AUTEC in July, 1971. Our conversation at this meeting again centered on my functions of reviewing data, computer operations, and General Service Administration contracts with Control Data Corporation (CDC) and IBM and assuming the duties of the West Palm Beach personnel on weekends.

4. On or about November, 1971, while on Agency business in West Palm Beach, I contacted Mr. Mulligan (West Palm Beach personnel administrator) concerning my reassignment to the U.S.A. in December, 1971 upon termination of tour of duty on Andros Island. Although I was anxious to return, I preferred to remain on Andros until a suitable job was offered to me. I had the option of extending my tour for five or six years. Mr. Mulligan informed me that he had no authority over the matter. On my behalf he placed a phone call to Newport, Rhode Island, Agency Headquarters, to a Mr. David Miller, a personnel specialist for the Agency. Mr. Miller and I talked by phone for approximately one-half hour and I specifically asked him to comment on the rumors that AUTEC, West Palm Beach might be closed and transferred to another area. Additionally, I inquired of him if the data processing group would remain a separate branch at West Palm Beach or was it anticipated that the group would either be absorbed with another group or function or would it be transferred to Andros. There were numerous rumors that the West Palm Beach activity would be closed or transferred and I had no desire to return to a job which was slated for liquidation. Mr. Miller assured me that the data processing group in West Palm Beach would remain in tact at that location and continue to perform on-site functions on Andros as in the past. I then requested to return to West Palm Beach. He said he would handle the paper work and keep me informed on developments. Having no further communication with him, my transfer was processed in December, 1971 and I returned to West Palm Beach from Andros on or about December 22, 1971. Approximately three months prior to receiving my RIF notice on April 11, 1972, I was assigned to the Data Processing Branch, Code 220, Mr. Fred Q. Barnett, Manager.

5. Upon my return to West Palm Beach, I became concerned about my future with the agency. Several employees had expressed their concern to me about losing their jobs. Mr. Barnett personally assured me that my job with the Agency was secure. He informed me that the Agency had told him to tell all personnel under his supervision that they had no intention of terminating any people. Based on these assurances I believed that my position was secure. On these assurances I purchased a home on Singer Island, Riviera Beach, Florida on or about December 30, 1971.

6. That, some of my major work functions with the Agency at the time of my severance include the Following. At that time, I was the only person performing these duties. A more complete list appears in the record on pages 151 through 158.

a) I was responsible for reviewing data produced on the testing range, Bahamas, to determine if such data was accurate and met the specifications as required in the Operation Directive. The function of AUTEC was to conduct scientific testing on the weapons, acoustics and sonar ranges for the U.S.A., foreign governments and private industry. Record, Pages 135 through 148.

b) I was responsible for certifying as to the accuracy of the lease and maintenance invoices received by the Government for use of computers and peripheral equipment from Control Data Corporation (CDC) and IBM. The invoices were compared with the GSA contracts made between CDC and IBM and the U.S.A., and upon my certification that they were true and correct they were processed for payment. The GSA contract requires the Government to perform this function.

c) I was responsible for checking equipment failure reports with the GSA contract provisions to determine if the Government was entitled to a credit or refund. I was solely responsible for this function, and at the time of my severance I was negotiating with CDC for refunds in excess of $40,000. Again the GSA contract requires the Government to perform this function. See Exhibit p. 13a.

d) I was responsible for monitoring the equipment vendor in the installation of new equipment, and I determined if the equipment was operational in conformance with the GSA contract. If the equipment did not perform according to the specifications in the GSA contract, it was not accepted until the vendor corrected the malfunction. The GSA contract requires the Government to perform this function.

e) I assisted in procuring parts and supplies for the computer equipment.

f) Based on my study of commitments made by the range to the user, I initiated the procurement of new equipment. Likewise, I determined if any computer equipment was surplus or not performing as required and made the decisions to release such items.

g) In addition to monitoring and evaluating the performance of data equipment furnished by CDC and IBM, I was responsible for monitoring and evaluating the performance of RCA who operated and maintained some of the equipment. Based on my evaluation of RCA performance, I would recommend that additional money over and above contract amounts be granted for outstanding work.

h) I was responsible for reviewing data being produced and on discovery of numerous reruns and errors would follow up with RCA to see that the problems were corrected.

i) The GSA contract states that the computer vendors will specify the frequency and duration of preventive maintenance, and the Government is responsible for scheduling. My responsibility included establishing these preventive maintenance schedules, to inform RCA of this schedule and see that preventive maintenance was being performed in compliance therewith. This is a Government function under the GSA contract. See attached Exhibit p. 13a.

j) I was responsible for resolving data discrepancy reports from the range user. For example, if RCA made errors in processing data for the range user I would determine if it were necessary to re-process it for the purpose of issuing new and correct data.

7. Upon severance from the Agency in June, 1972, I was still performing those functions described in paragraph 6. No function had been abolished or transferred at that time.

8. In March, 1972, the Agency Command in Newport issued preliminary instructions concerning the possibility of a reduction in force establishing competitive areas. This letter specifically stated: "In the event of a reduction in force in any competitive area, *vigorous effort* (emphasis supplied) will be made to assist employees with the requisite skills and training to obtain continuing positions that may become available within the overall

Center, in other Naval and Federal activities in and outside the commanding area, and where necessary, in private industry." Record, Page 202.

9. On or about the first week of March 1972, or approximately one month preceding my RIF notice, Mr. Griechen informed me that my work improvement suggestions, submitted by me on or about August, 1968 to February, 1972, would not qualify for a reward. In these Cost Saving Suggestions, I documented cost savings to the Government of approximately $1,000,000.00 for the first year. These suggestions were accepted and implemented by the Government. Mr. Griechen did not question the savings nor the suggested change in procedure, but based his decision on the ground that implementation of these cost saving suggestions were part of my job functions. Although I did not contest this decision, I am personally aware that Government incentive awards may be granted outside or within an employee's job responsibility, having received awards in the past for similar suggestions in similar functions.

10. In the morning on or about April 11, 1972, I was told to report to the Briefing Room. Mr. Soliozy entered and orally informed me and others present that all functions and positions of the data processing group were being abolished. Present at this announcement in addition to Mr. Soliozy were myself, Mr. Barnett, Mr. Brackett, Mr. Goble, Mr. Omeara, and Mr. Griechen. Approximately one-half hour later we were given the written notice which was dated April 7, 1972. (Record, Page 84) Mr. Omeara, at that time was Technical Director for the range. He stated that he was informed of the RIF only a few minutes preceding the announcement and was given no reason for

the action. The Agency did not ask me to retire before terminating me by RIF procedure.

11. Approximately one week later we were informed that we could not exercise any retention rights ("bump") with regard to any other employee being retained.

12. On or about May, 1972 I was interviewed by Mr. Carbonneau of the Agency with regard to my qualifications for a position with the Government and for placement on employment registers. Mr. Carbonneau qualified me for several job titles including: (a) Mathematician GS-12 and GS-13, (b) Physicist GS-12 and GS-13, (c) Operations Research Analyst GS-12 and GS-13, (d) Digital Computer System Administrator GS-12 and GS-13. During the interview I specifically requested Mr. Carbonneau to place my name on all job registers in Florida and he assured me that he would comply with my request. During the period preceding my termination date, the Agency was advertising vacancies in Florida in the same job classification and job grade as I was qualified for by Mr. Carbonneau above, but no job offer was or has been made to me. Record, Pages 206 through 219 and Page 229, 231. Several Government job positions for which I qualified were also advertised in Florida subsequent to my severance, but likewise no offer was or has been made to me.

13. On or about May, 1972, Mr. Brackett, also of the Data Group, subject to the RIF, told me that he had been made a job offer at Cape Canaveral, Florida, as a Mathematician GS-12 and was going to accept the transfer. Mr. Brackett told me that he was a non-veteran. The record confirms Mr. Brackett's appointment. Record, Page 231. Prior to my present job title, I was also with the Govern-

ment as a Mathematician GS-12 and GS-13, and had also been employed in private industry as a Mathematician. (Record, Pages 65 through 72), and promoted to Data Analyst. In addition, I was employed in private industry as an engineer. Therefore, I was of the opinion that since I was a veteran and had a higher retention standing that that position should have first been offered to me. Subsequently, on or about August, 1974, Mr. Brackett informed me that he had been transferred back to West Palm Beach and was performing data functions. He furthermore informed me that his functions at Cape Canaveral were similar to the same data functions he performed in West Palm Beach. Essentially, all functions in the data group were interchangeable.

14. On or about January, 1974, I wrote to the United States Civil Service Commission, Atlanta Regional Office, concerning my status on job registers for reemployment. On or about February, 1974 they replied that they had not placed me on any job register in Florida, but had submitted my name to Mobile and Huntsville, Alabama. (See Exhibit, pp. 16a-17a) Due to reduction in the space program and base closures, employees had been terminated. Therefore, I would consider my employment opportunities nil in these locations.

15. The following facts are also within my personal knowledge.

(a) That, I have sent out approximately eight employment applications to private industry and the Government since my RIF notice, and I have received no job offers.

(b) That, since my termination with the Agency, I have received no other job offers from the Government.

(c) That, neither the Agency nor any other branch of the Government has offered me any training for the purpose of qualifying me for any position with the Government.

(d) That, my job description with the Agency at time of separation was titled "Electronics Engineer/Physicist", GS-13. Record, Page 142.

(e) That for the purposed of determining my retention rights, i.e., my competitive level, my job title was limited to "Physicist (General)", GS-13, and did not consider my previous job titles and experience as an engineer, mathematician and data analyst.

(f) That in addition to requesting that I be considered for positions in Florida, I also requested to be considered for positions in Newport, Rhode Island; New London, Connecticut; Patrick Air Force Base; and Bermuda. (Exhibit, p. 15a)

(g) That, the Agency after giving me my RIF notice was advertising vacant positions with identical job titles as those I either currently held, or qualified for by Mr. Carbonneau in Florida and in other areas. (See paragraphs 11 and 12 and Exhibit, p. 18a)

(h) That, the Agency announced that it was expanding its personnel at West Palm Beach and there were vacancies in the proposed expansion for which I was qualified, as well as vacancies in the staffing plans for 1972 and 1973. (See also Record, Pages 221 and 222, Pages 206 through 218.)

(i) That, I inquired of the Agency, under my retention rights, about the position of Operations Research Analyst, GS-13 which was then being occupied with an incumbent with a lower retention standing. The Agency informed me that I could not "bump" any employee.

(j) That, I am and was fully qualified for this position of Operations Research Analyst GS-13; that the Agency's allegations that I could not perform this job without additional training in excess of two years is not correct; and that I have previously worked for approximately ten years in those areas described by the Agency as a requisite for the job. (Record, Page 37). As early in my career as 1959 and 1960 I began working with undersea and in-air data and developed some of the techniques being used on the testing range at time of my severance. My manager informed me that the President of the United States commended our work in the performance of processing in-water data on several missile impacts.

(k) That, there were other positions in West Palm Beach in the engineering and scientific areas being held by lower retention status employees for which I qualified. I asked to be considered for any one of these positions, but no position was awarded to me.

(l) That, I requested the Agency to get an independent study of my position qualifications for the purpose of exercising my retention rights, that the Agency orally informed me that such a study had been obtained and they found that I did not qualify for any other position. I asked the Agency to furnish me with a copy of the study but the Agency refused to comply with my request.

(m) That, in reference to my retention rights, the Agency informed me orally that the RIF notice by implication indicated they were complying with the regulations; that I asked the Agency to confirm and amplify this in writing but the Agency did not provide me with such confirmation.

(n) That, I made a request of the Agency to furnish me a reorganization plan in light of the fact that at the time of my severance there were 77 positions available and only 66 employees, or 11 vacancies. The Agency informed me that this information was irrelevant and refused to supply me with this information. Record Pages 247 through 259.

(o) That, at the West Palm Beach Center five employees were subject to the RIF. That, the Agency was expanding and upgrading AUTEC, West Palm Beach at the same time it was declaring a reduction in force. Record, Pages 221, 222)

(p) That, the Agency informed me that they were abolishing my functions and therefore they were abolishing my position.

(q) That, the Civil Service Commission and the Agency failed to furnish me with copies of the Agency's answer to my appeal.

/s/ JAMES O. MING
JAMES O. MING

SWORN to and subscribed before me this 25 day of October, 1974.

/s/ CARL U. COLLIER
NOTARY PUBLIC
My Commission Expires
Notary Public, State of
Florida at Large
My Commission Expires
May 5, 1978

EXHIBIT

6. MAINTENANCE OF EQUIPMENT

* * * *

(2) Preventive Maintenance — Preventive maintenance shall be performed at a time other than during the Government's working hours unless specified otherwise by the Government. Control Data shall specify in writing the *frequency and duration of the preventive maintenance required for the equipment listed on the order and the Government shall specify the schedule for the performance of the preventive maintenance* which shall be contiguous to the Principal Period of Maintenance. This schedule may be modified by mutual agreement.

* * * *

(5) *Malfunction Reports* — Control Data shall furnish to each Government installation a supply of CDC Form 318 which may be used by the Government to report date

and time of notification and a brief description of equipment malfunction. Control Data shall *furnish to the Government* one copy of this malfunction accident report upon completion of corrective action. The report shall include, as a minimum, the following:

a) date and time notified
b) date and time of arrival
c) type and model number(s) of machine(s)
d) time spent for repair
e) description of malfunction
f) general description of parts replaced.

in addition, Control Data shall furnish a copy of CDC Form No. AA1893 to the installation upon completion of each maintenance call which is made outside of the Principal Period of Maintenance and any selected extension thereto which will *provide the Government* with additional charges, if applicable. (Emphasis Added)

21 April 72

From: Ming, James O.

To: MA21 (D. C. Miller)

Subj: Consideration for Vacancies in Other NUSC Competitive Areas

Ref: (a) NUSC INST 12351.1A of 13 March 1972

1. I understand that I will receive consideration for all vacancies occuring within my present competitive area which is AUTEC, West Palm Beach, Florida.

2. In addition I wish to be considered for vacancies in other NUSC competitive areas defined by reference (a) and checked below by me.

✓ Newport, Rhode Island

✓ New London, Connecticut

✓ Complex 30, Patrick AFB, Fla.

✓ Bermuda

___ AUTEC, Andros Island

/s/ JAMES O. MING
Signature

United States Civil Service Commission

ATLANTA REGION
Merchandise Mart
240 Peachtree Street, N. W.
Atlanta, Georgia 30303

File: SD:NH:cgs

Date: February 21, 1974

Mr. James O. Ming
713 Sunset Road
W. Palm Beach, Florida 33401

Dear Mr. Ming:

The following action has been taken in connection with your application which you filed for placement assistance under the Displaced Employee Program:

On September 7, 1973, your name was removed from the DEP list when you failed to reply to our inquiry of June 29, 1973, which was sent to 226 Cascade Lane, Palm Beach Shores, Florida 33404. We had not received a change of address until your letter of January 18, 1974. Your name has been restored to the active DEP list.

You were registered in this Region on July 10, 1972, for the following series, positions and grade levels in the area offices shown:

GS-1310-12 Physicist, Huntsville; GS-1520-12, Mathematician, Huntsville; GS-330-12 Digital Computer System Administrator, Mobile.

You were also coded for each of these series at Grade Level GS-13 and Series GS-1515-13 and 12. Since these positions are under the jurisdiction of the Washington Area Office, your employing agency was responsible for submitting a DEP file there for registration.

Your term of DEP eligibility will expire on July 10, 1974.

AT PMS-87 8 70

A-76

MEMORANDUM
Department of the Navy

FROM: MA21
TO: Mr. Fred Barnett
SUBJ: Promotional Opportunity 41(72)

1. Mr. David Miller of the Manpower Resources Directorate has informed me of your concern regarding the status of P. O. #41(72). This promotional opportunity was announced in the NUSC Bulletin of 24 March, 1972. As stated in that announcement, the P. O. was to be used to fill several anticipated vacancies in the data systems analysis function at the Complex 30 Detachment, Cape Kennedy.

2. To date, management has decided to fill one vacancy under P. O. #41 (72). You were given serious consideration for this vacancy, together with the other qualified personnel who have received proposed notices of reduction-in-force at the Center's West Palm Beach facility. Mr. Mitchell Brackett was selected to fill the position.

3. At the present time a firm decision has not been made as to the level of effort required in the analysis area at Complex 30, or how this effort will be provided. Should a decision be made to add additional systems analysts to the staff, you may be assured that you will receive serious placement consideration.

/s/ SHEILA MADEN
Sheila Maden
Personnel Management
Specialist

Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1554

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES O. MING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1554

JAMES O. MING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the United States Court of Claims, challenging the termination of his employment as a GS-13 physicist with the Atlantic Undersea Test and Evaluation Center (AUTEC), a branch of the Naval Underwater Systems Center (NUSC). The complaint sought reinstatement, back pay, and punitive damages.

NUSC separated petitioner on June 16, 1972, under reduction in force (RIF) procedures governed by 5 C.F.R. Part 351. This action was affirmed by the Civil Service Commission's Board of Appeals and Review on petitioner's administrative appeal (Pet. App. A2-A8). The Court of Claims granted the government's motion for summary judgment and dismissed the petition, stating that "plaintiff has failed to state a claim upon which relief can be granted and * * * the administrative action is supported by substantial evidence and is not arbitrary, capricious or so grossly erroneous as to imply bad faith" (Pet. App. A1).

The decision of the Court of Claims is correct, and further review is not warranted.

1. Petitioner argues (Pet. 3, 12-18) that his position was not in fact abolished, that the functions were not transferred to a contractor, and that RIF procedures were therefore wrongfully applied. The evidence, however, supports the Civil Service Commission's finding that plaintiff's position was, in fact, abolished (Pet. App. A6). Petitioner contends that one of the functions of his position, that of monitoring outside contractors, was not in fact transferred (Pet. 16). But the monitoring of contractors was only one of several functions of petitioner's position (see Pet. App. A46-A48); the majority of petitioner's duties were transferred to an outside contractor.

2. Petitioner also argues (Pet. 3, 13, 19-22, 33) that the agency established a "competitive level" and a "competitive area" for him that were so narrow as to violate the RIF regulations and preclude him from exercising his retention and reemployment rights. In a reduction in force, employees compete for retention only within their competitive level and competitive area. 5 C.F.R. 351.201(a), 351.402(a), 351.403(a). The agency established petitioner's competitive level as "physicist" and his competitive area as West Palm Beach, Florida.

Petitioner asserts that his level should have included engineer and operations research analyst (Pet. 19). Although petitioner was deemed qualified for appointment as an operations research analyst and to other non-physicist positions (Pet. 23; Pet. App. A19), that does not mean that the agency could "readily" have assigned him "to any of the other positions without changing the terms of his appointment or unduly interrupting the work program"—the requirement under 5 C.F.R. 351.403(a). The agency and the Civil Service Commission found that petitioner did not meet that standard with regard to non-physicist positions (Pet. App. A7, A13, A20); his competitive level thus was not unduly narrow.

Petitioner also asserts that his competitive area should have included Andros Island, which is a 50-minute airplane flight from West Palm Beach (Pet. 22). Since Andros Island is not within the local commuting area of West Palm Beach (see 5 C.F.R. 351.402(b), 351.203(d)), the agency and the Civil Service Commission were correct in holding that petitioner's competitive area was not too narrow (Pet. App. A6, A10).

3. Petitioner further argues (Pet. 4, 24-27, 32-33) that he should have been reinstated or reemployed because the agency was advertising positions in areas for which he had qualified for employment and because another employee, subject to the same RIF but with a lower retention ranking, had been re-employed at Cape Kennedy. Since Cape Kennedy is outside petitioner's competitive area, the Civil Service Commission correctly held that appointments there were irrelevant to petitioner's RIF rights under 5 C.F.R. Part 351.[1] The unfilled vacancies within petitioner's competitive area also do not violate petitioner's RIF rights, since the RIF regulation does not require an agency to fill a vacant position. 5 C.F.R. 351.201(b).

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[1]Petitioner asserts (Pet. 26) that 5 C.F.R. Part 330, Subpart B, provides to the contrary. That part, however, provides for priorities in appointments from the reemployment priority list established and maintained for the commuting area in which employees were separated by the reduction in force (in this case, West Palm Beach). See 5 C.F.R. 351.1001(a) and FPM Ch. 351, Subchapter 10, p. 351-39. Part 330 does not provide petitioner with rights outside his commuting area.

Petitioner's allegation that the employee hired at Cape Kennedy was subsequently transferred to West Palm Beach (Pet. 27; Pet. App. A67), never raised administratively, likewise does not indicate a violation of petitioner's RIF rights, since the RIF regulations do not prevent an agency from filling a vacant position by reassignment (FPM Ch. 330, Subchapter 2, p. 330-7), and since the reassignment apparently occurred more than two years after petitioner's separation. See 5 C.F.R. 351.1001(a).

4. Petitioner also alleges that he was deliberately deceived into believing that his job at West Palm Beach would be secure (Pet. 3, 9-12, 32), that he was not provided with an administrative hearing (Pet. 4, 34, 35), and that contrary to his requests he was placed only on two employment registers in Alabama (Pet. 29, 33). These contentions were not addressed to the Civil Service Commission's Board of Appeals and Review and are not properly before this Court. See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37. They are, in any event, insubstantial.

Petitioner's claim of deliberate deception rests on his assertion that the study that ultimately led to the RIF was commenced prior to his alleged assurances of job security (Pet. 9). That a study of the mission, requirements, and personnel of AUTEC had been commenced does not mean that the agency was aware that there would be a reduction in force.

Petitioner claims that he was entitled to an administrative hearing, but he never requested such a hearing at the administrative level. Although employees subject to an "adverse action" are entitled to a hearing, a separation under a RIF action is not an adverse action as defined by statute or regulation. See 5 C.F.R. 752.103(b)(3); cf. *Fass* v. *Gray*, 197 F.2d 587, 592 (C.A. D.C.), certiorari denied, 344 U.S. 839.

Finally, petitioner's complaint that he was improperly placed only on employment registers in Civil Service offices in Huntsville and Mobile, Alabama, is without merit; those were in fact the Civil Service offices with jurisdiction over the employment locations requested by petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.